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No. 81-2408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

v.

DONALD C. FLOWERS AND KING E. JONES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the six-month limitations period contained in § 10(b) of the National Labor Relations Act determines the timeliness of a suit alleging that a union has breached the duty of fair representation created by that Act?

2. If not, whether in a hybrid § 301/breach-of-duty of fair representation action brought against an employer and union, the state statute of limitations governing actions to vacate arbitration awards, which *United Parcel Service v. Mitchell*, 451 U.S. 56, "borrowed" to determine the timeliness of the claim against the employer, also determines the timeliness of the claim against the union?

LIST OF PARTIES

In addition to the parties listed in the caption, the Bethlehem Steel Corporation was a defendant in the district court and an appellee in the court of appeals.

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OCTOBER TERM, 1981

No.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United Steelworkers of America, AFL-CIO-CLC ("USWA"), and its Local Union 2602, hereby petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, enabling this Court to review the judgment in *Donald C. Flowers and King E. Jones v. Local 2602 of the United Steelworkers of America, and United Steelworkers of America, International, and Bethlehem Steel Corporation,* (C.A. 2, No. 80-7020) (decided February 1, 1982).

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the federation of national and international unions with which USWA is

affiliated, supports the request for a writ of certiorari. This petition, which is the joint product of USWA and the AFL-CIO, reflects the identity of their views on the issues presented, and their desire to minimize the burdens on the Court by stating their common position only once.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York is not officially reported and is reprinted as Appendix E to this petition. The judgment of the District Court is reprinted as App. F. The Court of Appeals for the Second Circuit's *per curiam* judgment on the first appeal is unreported and is reprinted as App. D. The order of this Court granting the first petition for certiorari, vacating the judgment of the courts of appeals, and remanding the case for reconsideration in light of this Court's decision in *United Parcel Service v. Mitchell*, 451 U.S. 56, is reported at 451 U.S. 965, and is reprinted as App. C. The opinion of the court of appeals on remand is reported at 671 F.2d 87 and is reprinted as App. A.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was issued on February 1, 1982 (App. B). On April 21, 1982, Justice Marshall signed an order extending the time for filing a petition for a writ of certiorari to and including June 2, 1982 (App. G), and on May 20, 1982, Justice Marshall signed an order further extending the time for filing a petition to and including July 1, 1982 (App. H). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reprinted in App. I.

STATEMENT OF THE CASE [1]

Plaintiffs (respondents in this Court) are two employees of defendant Bethlehem Steel Corporation (hereinafter "the Company"), employed at its Lackawanna, New York plant, and represented for collective bargaining purposes by defendants United Steelworkers of America, AFL-CIO, and its Local Union 2602 (the petitioners in this Court, hereinafter collectively referred to as the "Union"). The Union and Company are parties to a collective bargaining agreement which contains, *inter alia*, a grievance and arbitration procedure for resolving differences "as to the meaning and application of the provisions of this Agreement." The Agreement empowers the Union to submit to arbitration grievances that cannot be resolved between the parties in the four-step grievance procedure established by the Agreement. The Agreement further provides that the arbitrator's resolution of a grievance "shall be final and binding upon the Company, the Union, and all Employees concerned therein."

Plaintiffs, who are craft welders, filed several grievances in 1975 and 1976 claiming that the Company had assigned their normal craft welding duties to others, while plaintiffs were on layoff or were assigned to non-craft work. Plaintiffs contended in their grievances that in doing so the Company had violated the collective bargaining agreement. The grievances sought backpay for the work opportunities plaintiffs had lost.

Throughout all steps of the grievance procedure the Company insisted that the plaintiffs' claims were without merit, and the Union invoked arbitration. On February 24, 1978, following an evidentiary hearing, the arbitrator

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[1] The case is here from the district court's granting of a motion to dismiss, and the court of appeals' reversal of that dismissal. Accordingly, the "facts" recited herein are those alleged in the complaint, which for present purposes must be assumed to be true.

issued an award holding that the Company's conduct had not violated the Agreement.

The complaint in this action was filed by plaintiffs on January 9, 1979, eleven months after the arbitrator issued the award. The complaint contained two counts, the first addressed to the Company and the second to the Union. Count I alleged that the Company violated the collective bargaining agreement by assigning welding work to others while plaintiffs were laid off or assigned to other work. Count II alleged that the Union's "preparation, investigation and handling of [plaintiff's grievances in arbitration] was so inept and careless as to be arbitrary and capricious" and thus constituted a violation of the Union's duty of fair representation.

The Union and Company each moved to dismiss the complaint on the ground that the suit was time-barred. The district court granted the motions to dismiss, holding that New York's 90-day statute of limitations for vacating arbitration awards is "the statute most specifically and obviously applicable to fair representation suits seeking to overturn the decision of an arbitrator" and that "applying [that statute] to federal labor law also serves the same policies that the statute serves in state law matters" (App. 14a). Plaintiffs appealed to the United States Court of Appeals for the Second Circuit.

While the appeal was pending, the Second Circuit decided *Mitchell v. United Parcel Service*, 624 F.2d 394 (1980), *rev'd*, 451 U.S. 56, an unrelated case posing the identical limitations question. In that case the Second Circuit reasoned that breach of contract and breach of duty suits "cannot be equated to direct attacks on arbitration awards," *id.* at 397, and accordingly held that "New York's six year limitations period for contractual breaches . . . is applicable to . . . actions by employees alleging wrongful discharge by the employer and breach of the fair representation duty by the union—regardless

of whether the discharge was upheld by an arbitral panel or became final short of arbitration," *id.* at 398.

On March 24, 1980, the Second Circuit issued a *per curiam* order in the instant case overturning the district court's decision (App. 10a). The order provided:

> [T]he order of said District Court be and it hereby is reversed based on this court's decision in *Mitchell v. United Parcel Service, Inc.*, slip op. 1525 (2d Cir. March 3, 1980), and the case is remanded to the district court.

The employer in *Mitchell* filed a petition for a writ of certiorari seeking review of the Second Circuit's decision in that case, and the Union in the instant case thereafter filed a petition for certiorari seeking review of the Second Circuit's decision herein. The *Mitchell* petition was granted, 449 U.S. 898, and this Court reversed the Second Circuit's judgment, holding that because Mitchell's claim against his employer was dependent upon proof that his "Union's duty to represent him fairly at the arbitration had been breached," the most analogous state statute of limitations was New York's 90-day statute for actions to vacate arbitration awards, under which Mitchell's claim was untimely. 451 U.S. at 62. The Court reserved the question whether, if properly raised, the six-month statute of limitations contained in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), would determine the timeliness of plaintiffs' claim, explaining that that question had been raised only by the AFL-CIO as *amicus curiae* and not by the parties, and that "the same result would obtain" were § 10(b) applicable. *Id.* at 60, n.2.

Two weeks after deciding *Mitchell*, the Court granted the Union's petition in the instant case, vacated the Second Circuit's decision, and remanded the case for reconsideration in light of *Mitchell* (App. 9a).

On remand of the instant case, a two-judge panel of the court of appeals, after receiving supplemental briefs,

affirmed the district court's judgment of dismissal in part and reversed that judgment in part. With respect to the claim against the Company, the court of appeals held that *Mitchell* required dismissal (App. 2a). But because the union in *Mitchell* had not sought review in this Court, the court of appeals did not view *Mitchell* as controlling with respect to the claim against the Union here, and the appellate court proceeded to inquire "whether the broad language of *Mitchell* applies to the duty of fair representation claim as well as to the breach of contract claim" (*Id.*)

In pursuing this inquiry, the court of appeals recognized that the "majority in *Mitchell* did not specifically limit the applicability of its decision to an employee's claim against his employer" (*id.* at 3a), and, indeed, that "[t]he [Supreme] Court's reasoning [in *Mitchell*] arguably may require applying the same time limit to causes of action against the union since the Court found . . . that 'to prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to contract but must also carry the burden of demonstrating breach of duty by the Union'" (*id.*, quoting 451 U.S. at 62). But while admittedly "pressed" by what it termed "the dicta of the majority [in *Mitchell*]" (App. 5a), the court of appeals found "more persuasive [the] reasoning expressed in a solitary dissenting opinion" of Justice Stevens (*id.*), and stated: "We believe Justice Stevens to be correct that the claim against the union for unfair representation may not be 'characterized as an action to vacate an arbitration award'" (App. 3a).

The court of appeals then turned to the separate question whether, as the Union had urged, the six-month limitations period of § 10(b) applied to plaintiff's fair representation claim. The court held that it did not, stating:

> We are persuaded by Justice Stevens' view [in *Mitchell*] that section 10(b) is inapplicable both because it relates only to administrative procedures established by Congress to resolve unfair labor practices (*see* Justice Stewart's concurrence) and because it was adopted by Congress six years before the duty of fair representation was recognized. Indeed, not until *Vaca v. Sipes*, 386 U.S. 171 (1967), did the Court clearly hold the duty judicially enforceable. [App. 5a-6a; footnotes omitted]

Having rejected the applicability of § 10(b) and the state arbitration statute, the court of appeals held that New York's "three-year nonmedical malpractice statute of limitations applies to the employees' action against the union for breach of its duty of fair representation," (App. 6a), and accordingly ruled that plaintiffs' claim against the union was timely. On the basis of the foregoing, the court of appeals affirmed the judgment of dismissal with respect to the Company and reversed the judgment of dismissal with respect to the Union, remanding the claim against the Union for a determination on the merits.

REASONS FOR GRANTING THE WRIT

The decision below raises two questions of fundamental importance in the litigation of "hybrid § 301 breach-of-duty actions," *Mitchell*, *supra*, 451 U.S. at 60 n.2 [2]

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[2] Such suits are "hybrid" because they present interdependent claims of (1) a breach of contract, which breach is actionable under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, and (2) a breach of the duty of fair representation, which breach is actionable under a "judicially implied cause of action," *Electrical Workers v. Foust*, 447 U.S. 42, 47 n. 9, to enforce the duty which is itself "implied in the National Labor Relations Act," *id.* at 46 n. 8. In such a hybrid § 301/breach-of-duty action, "[t]o prevail against either the company or the Union, [the plaintiff] must not only show that [the Company's action] was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-71.

—actions that contribute significantly to the caseload of federal and state courts throughout the nation.

The threshold question is whether the six-month limitations period contained in § 10(b) of the National Labor Relations Act applies to duty of fair representation claims, or whether, instead, a state limitations period must be borrowed. The *Mitchell* court expressly left that question open because the parties in that case had not invoked or addressed § 10(b) (p. 5, *supra*). The § 10(b) question is squarely raised here. And the Second Circuit's ruling on that question conflicts with a post-*Mitchell* decision by the Sixth Circuit holding § 10(b) to be applicable to a hybrid § 301/breach-of-duty action (p. 12, *infra*).

If the Court were to conclude that § 10(b) is not applicable here, the other question decided below would then assume critical importance in the litigation of hybrid § 301/breach-of-duty claims: are state statutes of limitations governing actions to vacate arbitration awards, which *Mitchell* held applicable to such claims against employers, also the "appropriate" statutes to be borrowed for such claims against unions. On this issue, the decision below—rejecting the arbitration time limit and applying the limitations period for attorney malpractice actions—conflicts with decisions of the Fourth, Sixth, and Ninth Circuits, and, moreover, is inconsistent with the rationale of *Mitchell* itself, as the court below virtually conceded. *See* pp. 13-17, *infra*.

The two questions presented herein merit immediate consideration by this Court. Because this Court did not reach the § 10(b) issue in *Mitchell*, and because the union in that case did not seek review of the Second Circuit's decision to borrow a contract limitations period, this Court's decision leaves uncertain what limitations period applies to hybrid § 301/breach-of-duty actions against unions. There are an enormous number of such actions pending in the lower courts, in many of which limitations defenses

have been raised that—depending on the answers to these questions—may be dispositive. As noted, the courts of appeals are divided on these issues. And the law in this area in the district courts—in which 52 decisions involving the questions presented here have been issued in the 14 months since *Mitchell* was decided—is in disarray.[3]

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[3] The post-*Mitchell* district court decisions divide six ways:

1. Seven courts have held § 10(b) to be applicable to fair representation claims and on that basis have dismissed such claims against unions (or, in two instances, refused to dismiss claims that would have been dismissable were the state arbitration statute of limitations applicable). *See, Benson v. General Motors Corp.*, 81 M 0416 (N.D. Ala. 1981), *app. pending*, 82-7015 (11th Cir.); *Bates v. American Tara Corp.*, C 81 768 A (N.D. Ga. 1981), *app. pending*, 82-8137 (11th Cir.); *Brown v. S. Central Bell*, 81 P 1678 S (N.D. Ala. 1982); *Collins v. Car Carriers, Inc.*, 536 F.Supp. 776 (N.D. Ill. 1982); *Hanson v. Motor Convoy, Inc.*, 80 1482 CIV EBD (S.D. Fla. 1981); *Kaftantzis v. D&L Transport Co.*, 531 F.Supp. 566 (N.D. Ill. 1982); *Ruffin v. Communication Workers*, 78 2894 (E.D. La. 1981), *app. pending*, 82-3127 (5th Cir.); *Vantine v. Sun Ship Building & Dry Dock Co.*, 82-701 (E.D. Pa. 1982) (dictum).

2. Two courts have held § 10(b) not applicable but have borrowed the state arbitration statute of limitations period instead to determine the timeliness of the fair representation claim against a union. *Fedor v. Hygrade Food Products Corp.*, 535 F.Supp. 269 (E.D. Pa. 1982); *Sheeran v. MA Bruder & Sons, Inc.*, 524 F.Supp. 567 (E.D. Pa. 1981).

3. Thirty-two courts, without considering § 10(b), have simply applied the state arbitration statute of limitations to a fair representation claim against a union. *Assad v. Mt. Sinai Hospital*, 81-C-2273 (E.D.N.Y. 1982); *Bigbie v. Teamsters Local 142*, 520 F.Supp. 402 (N.D. Ill. (1981); *Cade v. Bethlehem Steel Corp., et al.*, JH 80-3332 (D.Md. 1982); *Collins v. Cook Paint & Varnish Co.*, C-81-2795 EFL; *Creed v. Miller Transporters Inc. & Teamsters*, GC 81-32-WK-P (N.D. Miss. 1981); *D'Andrea v. Postal Workers*, C-1-78-520 (S.D. Ohio 1981); *Davenport v. Champion Int'l Corp.*, 80 G 1262-NW (N.D. Ala. 1982); *Dreher v. Crown Zellerbach*, 80-185 LE (D.Ore. 1982); *Edwards v. Sea-Land*, 8 81 738 (S.D. Tex.), *app. pending*, 81-2283 (5th Cir.); *Englesberg v. Transcon Lines Inc.*, 520 F.Supp. 628 (W.D. Wash. 1982); *Essary v. Railroad Yardmasters*, 77 C 4651 (N.D. Ill. 1981); *Evans v. Maislin Trans-*

I. THE § 10(b) ISSUE

The question whether § 10(b) or a state limitations period applies to fair representation claims is an open

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port Ltd., No. 81 C 2753 (N.D.Ill. 1982); *Fields v. Babcock & Wilcox*, 108 L.R.R.M. 3150 (W.D.Pa. 1981); *Fogel v. Teamsters Local 773*, 531 F.Supp. 483 (E.D.Pa. 1982); *Ford v. BP Oil Co.*, JH 81-90 (D.Md. 1981); *Gerba v. Gilmore Steel Corp.*, 81-985 (D.Ore. 1982); *Hand v. Chemical Workers*, MCA 81 0219 (N.D.Fla. 1981), *app. pending*, 81-5828 (11th Cir.); *Hudson v. Teamsters*, 536 F.Supp. 1138 (S.D. Ohio 1982); *Jenkins v. Steelworkers*, 80-721 (E.D. Pa. 1982); *Kikos v. Teamsters*, 526 F.Supp. 110 (E.D. Mich. 1981); *Krakowski v. Machinists*, 4-81-706 (D. Minn.); *Leach v. Postal Service, et al.*, C-1-80-526 (S.D. Ohio 1981); *Madia v. Pacific Inter. Express*, No. 81 C 360 (N.D. Ill. 1982); *McCoy v. Teamsters Local 100*, 526 F.Supp. 1256 (S.D. Ohio 1981); *Murray v. Branch Motor Express Co.*, HM78-1714 (D.Md. 1982); *Penson v. Chrysler Corp.*, 109 L.R.R.M. 3359 (N.D. Ohio 1981); *Pyle v. Arco Polymers, Inc.*, 81 C 3586 (N.D. Ill. 1982); *Reynolds v. Pacific Motor Trucking*, C-80-3055 (N.D. Cal. 1982); *Rigby v. Roadway Express*, 109 L.R.R.M. 3252 (S.D. Miss. 1981), *app. pending*, 81-4516 (5th Cir.); *Ross v. Bethlehem Steel Corp., et al.*, 109 L.R.R.M. 2791 (D. Md. 1981); *Talley v. USPS*, 532 F.Supp. 786 (D. Minn. 1982).

4. Four courts have held § 10(b) not applicable, and have borrowed a state tort limitations period to determine the timeliness of the fair representation claim against a union. *Dent v. USPS*, C-1-81-537 (S.D. Ohio 1981); *Mabane v. Metal Masters Food Service Equip. Co.*, K 80-973 (D. Md. 1982); *Rogers v. Lockheed Georgia Co.*, C 80 461A (N.D. Ga. 1981), *app. pending*, 81-7810 (11th Cir.); *Suwanchi v. Electrical Workers*, 528 F.Supp. 851 (D.N.H. 1981).

5. Two courts, without considering § 10(b), have borrowed a state tort limitations period. *Graham v. Chemical Workers*, 81 535 (M.D. Fla. 1981), *app. pending*, 82-5115 (11th Cir.); *McFarland v. Teamsters*, 535 F.Supp. 970 (N.D. Tex. 1982).

6. Five courts have decided that either § 10(b) or a state arbitration statute applies, but have declined to decide which is applicable, finding claims untimely under either alternative. *Creer v. USPS*, 109 LRRM 2706 (N.D. Ala. 1981); *McQuay v. Bethlehem Steel Corp.*, 109 LRRM 2159 (D. Md. 1981); *Reno v. Teamsters Local 568*, No. 82-0278 (W.D. La.), *Scott v. Chrysler Corp.*, 107 LRRM 3086 (E. D.Mich. 1981); *Stevens v. Gateway Transportation Co.*, 79 L 2228 (N.D. Ill. 1982).

The forty-six decisions cited in paragraphs 1, 2, 3 and 6 of this footnote are in conflict with the Second Circuit's decision in the

one in this Court. In *Mitchell* the Court stated at the outset of its opinion:

> *Amicus* The American Federation of Labor and Congress of Industrial Organizations has filed a brief arguing that in cases such as the present courts should apply the 6-month limitations period found in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). The AFL-CIO distinguishes . . . [*UAW v.*] *Hoosier Cardinal* [*Corp.*, 383 U.S. 696 (1966), in which the Court had applied a state limitations period to a § 301 claim] on the ground that *Hoosier Cardinal* involved a § 301 action by a union against an employer, while actions brought by employees against both their union and employer . . . are hybrid § 301 breach of duty actions, the union's duty being implied from the NLRA. *We decline to consider this argument since it was not raised by either of the parties here or below.* Our grant of certiorari was to consider *which* state limitations period should be borrowed, not whether such borrowing was appropriate. The parties have considered the question as being limited to which state limitations period to borrow. Since respondent filed his complaint beyond the 6-month period, the same result would obtain in this case were we to adopt the AFL-CIO's position. [451 U.S. at 60 n.2 (emphasis added; citations omitted)]

That the § 10(b) question merits the attention of this Court is apparent from the conflicting views that were expressed in the concurring and dissenting opinions in *Mitchell*, as well as from the circuit conflict that has subsequently developed. Justice Stewart alone in *Mitchell* would have decided the § 10(b) issue despite the parties'

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instant case; the six decisions cited in paragraphs 4 and 5 are consistent with the Second Circuit's decision.

A number of these cases are still pending either in the district court on claims which were not dismissed, or in the courts of appeals. In addition, we are aware of another sixty pending hybrid § 301/breach-of-duty actions in which dispositive limitations issues have been raised but have not yet been decided; a listing of those cases appears in Appendix J, App. 23a-24a.

failure to address it, and he concluded that "§ 10(b) is . . . the proper source for determining when claims of breach of duty must be raised," *id.* at 68 n.3. Justice Stewart reasoned that § 10(b) "is a clear indication of Congress' judgment of when claims of a very similar or identical character must be brought," *id.* at 68 n.3, and that "the policy behind [§ 10(b)]"—"to safeguard the stability of collective-bargaining agreements"—"applies with equal force in this [fair representation] context," *id.* at 68.

Two other Justices in *Mitchell*, while concluding that "resolution of the § 10(b) question properly should await the development of a full adversarial record," *id.* at 65 (Blackmun, J., concurring), see also *id.* at 76 (Stevens, J., dissenting), nonetheless commented on the question. In his concurring opinion, Justice Blackmun stated: "I find much that is persuasive in Justice Stewart's analysis." *Id.* at 65. And in his dissenting opinion Justice Stevens voiced an opposite opinion, stating that "[t]he plain language of [§10(b)] indicates that it is directed solely to the administrative procedure established by Congress . . . for the resolution of unfair labor practice charges," *id.* at 76 n.8, and that it would be "strain[ing] to conclude that Congress intended that § 10(b) . . . be applied to causes of action that this Court had not yet divined when § 10(b) was enacted," *id.* at 76.

In the wake of *Mitchell*, the courts of appeals have rendered conflicting decisions on the § 10(b) issue left open in *Mitchell*. The court below, of course, held that § 10(b) does not apply to fair representation claims. But in *Badon v. General Motors Corp.*, 110 LRRM 2562 (6th Cir. May 25, 1982), the United States Court of Appeals for the Sixth Circuit applied § 10(b) to a hybrid § 301/breach-of-duty action against a union, finding § 10(b) to be "the most appropriate statute of limitations under the[] circumstances [of that case]," *id.* at 2566.[4]

[4] The "circumstances" to which the *Badon* court referred were the unavailability of any state arbitration time limit that could be

The question whether § 10(b) or state law determines the limitations period for fair representation lawsuits thus is unsettled in this Court and has divided the courts of appeals. The proper resolution of the question is critical to the course of litigation of a large number of fair representation claims and may be dispositive of numerous pending cases (p. 11, n.3, *supra*). For these reasons the Court should grant a writ of certiorari to resolve the issue.

II. THE APPROPRIATE STATE LIMITATIONS PERIOD ISSUE

If the Court were to conclude that § 10(b) is not applicable to fair representation lawsuits, then the Court would confront the other question decided by the court below: are state arbitration statutes of limitations, which *Mitchell* teaches are the "appropriate" statutes to be borrowed for hybrid § 301/breach-of-duty claims against employers, also the appropriate state statutes to be borrowed for such claims against unions. The lower court's negative answer to that question is inconsistent with the rationale of this Court's decision in *Mitchell* and in conflict with the post-*Mitchell* decisions of three other courts of appeals.

"borrowed"; the court ruled that if such a time limit were available it would control, but that as Michigan's judicially-promulgated time limit for bringing actions to vacate arbitration awards is by its terms inapplicable to labor arbitration "borrowing" it would be inappropriate. In the absence of a "borrowable" state arbitration time limit, the *Badon* court concluded, in direct conflict with the Second Circuit's decision herein, that § 10(b)—and not state tort or contract limitation statutes—was the appropriate source for determining the timeliness of hybrid § 301/breach-of-duty claims against union.

In our view, the question whether § 10(b) applies to fair representation claims should have been the threshold issue in *Badon* (and not the second question to be decided) for if federal law (through § 10(b)) supplies a limitations period for fair representation claims, there then is no occasion to "borrow" state limitations periods. The *Badon* court's error in the order in which it addressed the issues, however, does not affect its analysis of the § 10(b) issue once it found that Michigan had no applicable arbitration time limit.

1. The court of appeals' conclusion turns the Court's analysis in *Mitchell* on its head, as the appellate court itself virtually conceded (p. 6, *supra*). In *Mitchell*, this Court noted that the elements of a hybrid § 301/breach-of-duty claim against an employer are the same as the elements of such a claim against a union, stating:

> 'To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.' [451 U.S. at 62, quoting *Hines*, *supra*, 424 U.S. at 570-571]

Moreover, in *Mitchell* the Court rejected the plaintiff's contention that the statute of limitations applicable to suits for breach of contract should govern his action against the employer precisely because plaintiff, in order to prevail against the employer, was required to prove not just a breach of contract but also a breach by the union of its duty of fair representation. It was the *fair representation* component that the Court held warranted application of the shorter time limit, and the employer secured the benefit of that shorter time limit because proof of a breach of the union's duty was an element of the contract claim against the employer:

> It is true that respondent's underlying claim against his employer is based on the collective-bargaining agreement, a contract. It is not enough, however, for an employee such as respondent to prove that he was discharged in violation of the collective-bargaining agreement . . . . [*R*]*espondent's characterization of his action against the employer as one for "breach of contract" ignores* the significance of the fact that it was brought in the District Court pursuant to § 301(a) of the LMRA and *that the indispensable predicate for such an action is not a showing under traditional contract law that the discharge was a breach of the collective-bargaining agreement, but instead a demonstration that the union breached its duty of fair representation.* Since

> the conclusion of the Joint Panel was, under the collective-bargaining agreement, "binding on all parties," *respondent was required in some way to show that the Union's duty to represent him fairly at the arbitration had been breached before he was entitled to reach the merits of his contract claim.* This, in our view, makes the suit more analogous to an action to vacate an arbitration award than to a straight contract action.
>
> *We think that the unfair representation claim made by an employee against his union, even though his employer may ultimately be called upon to respond in damages for it if he is successful, is more a creature of "labor law" as it has developed since the enactment of § 301 than it is of general contract law.* [451 U.S. at 62-63; emphasis added]

Thus, to hold that the claim against the union is not governed by the arbitration statute that this Court applied to the claim against the employer flies in the teeth of *Mitchell.*

2. In the wake of *Mitchell*, three courts of appeals have concluded, contrary to the decision below, that state arbitration time limits apply to hybrid § 301/breach-of-duty claims against unions that arise in the grievance-arbitration context just as this Court held that those time limits apply to such claims against employers.

In *Singer v. The Flying Tiger Line, Inc.*, 652 F.2d 1349 (9th Cir. 1981), the United States Court of Appeals for the Ninth Circuit interpreted *Mitchell* to mean "that a suit against a union and employer following an arbitration award could best be characterized as a suit to vacate the arbitration award." *Id.* at 1353. The court accordingly held that "we shall treat suits against the union for a breach of the duty of fair representation and against an employer for a breach of a collective bargaining agreement under this type of limitations statute." *Id.*[5]

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[5] The court in *Singer* went on to hold that within the Ninth Circuit *Mitchell* would be given only prospective effect because

In *Badon v. General Motors*, *supra*, the United States Court of Appeals for the Sixth Circuit reached the same conclusion, finding that "[t]he *Mitchell* rule . . . applies to [plaintiff's] unfair representation claim against the [union]" (110 LRRM at 2505). The court added:

> Although certain distinctions can be drawn between the separate section 301 claims against the company and the union, *see Mitchell*, *supra*, at 72-75 (Stevens, J., concurring in part, dissenting in part), we feel the better rule applies the same statute of limitations to both parties.[6]

Finally, in *DelCostello v. Teamsters*, No. 81-2086 (April 19, 1982), the United States Court of Appeals for the Fourth Circuit also held a state arbitration time limit applicable to a fair representation claim against a union. The district court in that case had, in the court of appeals' words, "dismissed the suit and ruled that it was barred as to both the employer and the union by the

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within that circuit "the *Mitchell* case is not one which might have been anticipated" and the plaintiff in *Singer* "might reasonably have relied upon [an earlier Ninth Circuit decision] to conclude that he had three years to file a claim." 652 F.2d at 1353. Plaintiffs here can make no similar claim, for in October, 1976, sixteen months *before* plaintiffs' cause of action accrued, the Western District of New York (where this case was filed) ruled that the limitations period for hybrid § 301/fair representation claims arising in the grievance-arbitration context was the 90-day limitations period for actions to vacate such awards. *Barbarino v. Anchor Motor Freight, Inc.*, 421 F.Supp. 1003 (W.D.N.Y. 1976). Indeed, respondents did not even seek below a ruling that *Mitchell* is not retroactive and the court below *did* apply *Mitchell* retroactively by dismissing the claim against the Company.

[6] In *Badon* the court went on to hold that Michigan's judicially-promulgated rule fixing the time within which challenges to arbitration awards must be brought would not be borrowed in a hybrid § 301/breach-of-duty action against either an employer or a union because that rule, by its terms, excludes actions involving labor arbitrations. See n.4, *supra*. But in other jurisdictions within the Sixth Circuit, in which state arbitration statutes do not contain such an exclusion, *Badon* requires the application of such statutes to hybrid § 301/breach-of-duty claims against unions.

thirty-day limitations period contained in [the Maryland statute governing actions to vacate arbitration awards]." The court of appeals held that "the district court was correct in its conclusion" and the appellate court "affirm[ed] on the basis of [the district court's] memorandum and order." [7]

The rule established by the decision below for cases within the Second Circuit thus is in square conflict with the rule in three other circuits, as well as inconsistent with the rationale of *Mitchell*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7] The Fourth Circuit's opinion in *DelCostello* is unreported, and is reprinted as App. K to this petition. The district court's decision is reported at 524 F.Supp. 721.

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 957, Docket 80-7020

DONALD C. FLOWERS and KING E. JONES,
Appellants,

v.

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA, and UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL, and BETHLEHEM STEEL CORPORATION,
Appellees.

Argued March 21, 1980

Decided Feb. 1, 1982

Before LUMBARD and OAKES, Circuit Judges.*

OAKES, Circuit Judge:

On May 4, 1981 the Supreme Court vacated this court's judgment, made by summary order, in favor of appellants Flowers and Jones, and remanded this action for further consideration in light of *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981).

Flowers and Jones, craft welders at the Bethlehem Steel Corporation, commenced this action against both their employer and their union under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging that Bethlehem Steel breached its collective bargain-

* Judge Mulligan left the court before the judgment in this cause was vacated and the cause remanded to this court for reconsideration. In accordance with § 0.14(b) of the Rules of this Court this appeal was decided solely by the two remaining members of the panel who are in agreement and who do not request the designation of a third judge.

ing contract by wrongfully discharging the employees and that Local 2602 subsequently breached its duty of fair representation in an arbitration hearing. The complaint in this action was filed approximately eleven months after the employees, represented by the union, had lost in arbitration on the wrongful-discharge claim. The district court dismissed the complaint for failure to comply with New York's ninety-day statute of limitations for suits to vacate or modify an arbitration award. N.Y.Civ.Prac.Law § 7511(a) (McKinney). We reversed on the basis of the decision in *Mitchell v. United Parcel Service, Inc.*, 624 F.2d 394 (2d Cir. 1980), which held on similar facts that the lower court should have applied New York's six-year limitations period for actions alleging breach of contract. N.Y.Civ.Prac.Law § 213(2) (McKinney).

The employer in *Mitchell* petitioned for review of the court of appeals' decision, although the union did not do so. The Supreme Court characterized the claim against the employer for wrongful discharge as in essence an action to set aside an arbitration award. Accordingly, the Court reversed and stated that the appropriate standard to apply was the ninety-day limitations period for actions to vacate an arbitration award. But as Justice Stevens emphasized in his opinion, concurring in part and dissenting in part, the Court's reasoning as to the claim against the employer did not necessarily determine which statute of limitations governed the employee's claim against the union for lack of fair representation. Thus, on remand in *Flowers* we must reverse under *Mitchell* as to the employer Bethlehem Steel Corporation and we hereby do so. But we still must resolve whether the broad language of *Mitchell* applies to the duty of fair representation claim as well as to the breach of contract claim. If we conclude that it does not, we must also determine which statute of limitations applies. We have read with interest the parties' briefs on these questions.

We believe Justice Stevens to be correct that the claim against the union for unfair representation may not be "characterized as an action to vacate an arbitration award." 451 U.S. at 73, 101 S.Ct. at 1569. If the employee prevails against the union, the arbitration award is unaffected since the arbitration "Joint Panel" did not address any dispute between the employee and the union. Moreover, the claim that the union breached its duty of fair representation, as Justice Stevens pointed out in his footnote 3,[1] could not be resolved in the arbitration proceeding because it arose out of the conduct of that proceeding itself. Conceptually, then, we agree that the claim against the union is not governed by the statute of limitations for actions to vacate arbitration.

What makes the case difficult is that having Justice Stevens' opinion before it, the seven-person majority in *Mitchell* did not specifically limit the applicability of its decision to an employee's claim against his employer. The Court's reasoning arguably may require applying the same time limit to causes of action against the union since the Court found, quoting *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71, 96 S.Ct. 1048, 1059. 47 L.Ed.2d 231 (1976), that "to prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. . . . The grievance process cannot be expected to be error-free." *See* 451 U.S. at 62, 101 S.Ct. at 1563. This language suggests that the Court would apply to the unfair-representation claim the same ninety-

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[1] Justice Stevens' footnote 3 reads as follows:

> By its very nature, the employee's claim that the union breached its duty of fair representation cannot be resolved in an arbitration proceeding because it arises out of the conduct of that proceeding itself.

451 U.S. at 73, 101 S.Ct. at 1569.

day limitations period as it applied to the claim against the employer.

Other statements in the *Mitchell* opinion indicate, however, that a different statute of limitations applies to the claim against the union. The Court's observation that the unfair-representation claim is "more a creature of 'labor law' as it has developed since the enactment of § 301 than it is of general contract law," coupled with references to *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707, 86 S.Ct. 1107, 1114, 16 L.Ed.2d 192 (1966), and to 29 U.S.C. § 160(b) (1976) (six-month period under NLRA), 451 U.S. at 62, 101 S.Ct. at 1563, suggest that the federal labor law statute should apply, as Justice Stewart's *Mitchell* concurrence indicated, *id.* at 63, 101 S.Ct. at 1564. At the same time, the Court observed that efforts to characterize *Hines* actions as actions for breach of contract, actions upon a statute, personal injury actions, or malpractice actions "all suffer from the same flaw . . . : they overlook the fact that an arbitration award stands between the employee and any relief which may be awarded *against the company*," *id.* at 62 n.4, 101 S.Ct. at 1564 (emphasis added).[2] This language may be taken to imply agreement with Justice Stevens' view that claims *against the union*, which are not the subject of the prior arbitration, cannot be characterized as actions to vacate an arbitration award. On the other hand, this language may be interpreted as a refutation of Justice Stevens' view.

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[2] Footnote 4 of the *Mitchell* opinion reads as follows:

> Respondent suggests *Hines* actions might also be characterized as actions upon a statute, personal injury actions, or malpractice actions, all governed by a 3-year limitations period in New York. N.Y.Civ.Prac.Law §§ 214(2), 214(5), 214(6). All of these characterizations suffer from the same flaw as the effort to characterize the action as one for breach of contract: they overlook the fact that an arbitration award stands between the employee and any relief which may be awarded against the company.

451 U.S. at 62, 101 S.Ct. at 1564.

The question then becomes whether we are bound to follow the somewhat equivocal dicta expressed by a majority of the Court with reference to a matter which was not specifically before it, or whether we can follow what we think is the more persuasive reasoning expressed in a solitary dissenting opinion. We have struggled with this difficult question. Though we are pressed by the dicta of the majority, we are persuaded by Justice Stevens' analysis. Accordingly, we hold that the arbitration award statute of limitations does not apply.

The question remains whether to apply the three-year statute of limitations for malpractice actions, N.Y.Civ. Prac.Law § 214(6), or the six-month limitations period of section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1976). We are persuaded by Justice Stevens' view[3] that section 10(b) is inapplicable both

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[3] Justice Stevens' footnote 7 reads as follows:

> Under the rationale of *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704-705, 86 S.Ct. 1107, 1112-1113, 16 L.Ed.2d 192, arguably the proper statute of limitations to apply to such a claim would be N.Y.Civ.Prac. Law § 214(6) (McKinney 1976), which governs claims for nonmedical malpractice. Because the question of the appropriate statute of limitations to apply to respondent's claim against his union is not properly presented in this case, I express no definite opinion on the point. I note, however, that the Court dismisses the suggestion that this action may be characterized as a malpractice action with the observation that this characterization "overlook[s] the fact that an arbitration award stands between the employee and any relief which may be awarded *against the company.*" *Ante*, at 1564, n.4 (emphasis supplied). Because no arbitration award stands between the employee and any relief which may be awarded against the union, this observation is inapplicable to the claim against the union.

451 U.S. at 75, 101 S.Ct. at 1570.

His footnote 9 reads as follows:

> The National Labor Relations Act was enacted in 1935. 49 Stat. 449. Although § 10(b) was a part of the Act at that time, in its original form it did not contain a period of limitations. 49 Stat. 453-454. The 6-month limitations period upon which

because it relates only to administrative procedures established by Congress to resolve unfair labor practices (*see* Justice Stewart's concurrence[4]) and because it was adopted by Congress six years before the duty of fair representation was recognized. Indeed, not until *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), did the Court clearly hold the duty judicially enforceable. On the other hand, an action for breach of the union's duty fairly to represent its members at arbitration proceedings is closely analogous to an action for attorney malpractice. *See Mitchell*, 451 U.S. at 61, 101 S.Ct. at 1563 ("Our present task is to determine which limitations period is the 'most appropriate one provided by state law' "). We conclude, therefore, that the three-year

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Justice Stewart relies was added to § 10(b) in 1947. 61 Stat. 146. Six years later, the Court decided the first in a series of cases recognizing that the National Labor Relations Act imposes a duty of fair representation upon unions. *See Ford Motor Co. v. Huffman*, 345 U.S. 330 [73 S.Ct. 681, 97 L.Ed. 1048]. In 1967, in *Vaca v. Sipes*, 386 U.S. 171, [87 S.Ct. 903, 17 L.Ed.2d 842] the Court clearly held that this duty may be judicially enforced. See generally *Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554, 563-567 [96 S.Ct. 1048, 1055-1057, 47 L.Ed.2d 231].

451 U.S. at 76, 101 S.Ct. at 1571.

[4] Justice Stewart's footnote 4 reads as follows:

Concededly, the terms of § 10(b) are directed to the administrative procedures provided by Congress to resolve unfair labor practices. But the fact that Congress did not provide a limitations period for a judicially enforceable action later found implied in the NLRA is not comparable to a congressional failure to establish a time limitation for an action it expressly creates by statute. *Cf. Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 [97 S.Ct. 2447, 2454, 53 L.Ed.2d 502]. In any case, it cannot reasonably be assumed here that congressional silence reflects an intent to apply state statutes of limitation for an action based in part on rights and obligations traceable to the NLRA.

451 U.S. at 68, 101 S.Ct. at 1567.

nonmedical malpractice statute of limitations applies to the employees' action against the union for breach of its duty of fair representation. This would make the action against the union timely commenced.

Judgment dismissing the complaint against Bethlehem Steel Corporation affirmed; judgment dismissing the complaint against Local 2602 of the United Steel Workers of America and the United Steel Workers of America, International reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of February one thousand nine hundred and eighty-two.

Present: HON. J. EDWARD LUMBARD
HON. JAMES L. OAKES
Circuit Judges,

#80-7020

DONALD C. FLOWERS and KING E. JONES,
Plaintiffs-Appellants,

v.

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA, UNITED STEEL WORKERS OF AMERICA INTERNATIONAL, BETHLEHEM STEEL CORPORATION,
Defendants-Appellees

Appeal from the United States District Court for the Western District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part and reversed in part in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

APPENDIX C

UNITED STATES SUPREME COURT

No. 80-26

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL.

v.

FLOWERS ET AL.

C. A. 2d Cir.

May 4, 1981

Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United Parcel Service, Inc. v. Mitchell, ante*, p. 56. Reported below: 622 F. 2d 573.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of March one thousand nine hundred and eighty.

Present: HON. J. EDWARD LUMBARD
HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES

Circuit Judges,

80-7020

DONALD C. FLOWERS and KING E. JONES,
Plaintiffs-Appellants,

against

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA, and UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL, and BETHLEHEM STEEL CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was taken on submission.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed based on this court's decision in *Mitchell v. United Parcel Service, Inc.*,

slip op. 1525 (2d Cir. Mar. 3, 1980), and the case is remanded to the district court.

/s/ J. Edward Lumbard

/s/ William H. Mulligan

/s/ James L. Oakes

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-79-40

DONALD C. FLOWERS and KING E. JONES,
Plaintiffs,

v.

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA,

and

UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL,

and

BETHLEHEM STEEL CORPORATION,
Defendants.

MEMORANDUM AND ORDER

This is an unfair-representation action under section 301 (29 U.S.C. § 185) of the Labor Management Relations Act ("the LMRA"). Plaintiffs, craft welders who were laid off by Bethlehem Steel Corporation ("Bethlehem") from November 1975 until April 1976, allege that they were laid off in violation of the collective bargaining agreement between Bethlehem and The United Steel Workers of America, International ("USW"), and that Local 2602 of the United Steel Workers of America ("Local 2602"), which presented plaintiffs' grievances first to Bethlehem and then to an arbitrator (who held in favor of Bethlehem), presented their grievances so negligently as to amount to an arbitrary and capricious failure to present their arguments. The arbitrator handed down his decision adverse to plaintiffs February 24, 1978; the instant suit was filed January 19, 1979.

Now before me is defendants' motion to dismiss this action on grounds that the statute of limitations has run.

The LMRA contains no statute of limitations. The United States Supreme Court has held that, in the absence of such a statute, federal courts are to apply, as a matter of federal law, the "appropriate state statute of limitations." *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 705 (1966).

The Court has provided no specific guidance as to the statute of limitations appropriate to unfair-representation suits. However, this question has been analyzed in a number of district court opinions. Where a grievance has proceeded to arbitration and state law (such as N.Y. CPLR § 7511) provides for a particularly short period of time in which to challenge an arbitrator's decision, these courts have uniformly held that the special statute of limitations was applicable. *See, e.g., Wallace v. American Tel. & Tel. Co., Inc.*, 460 F.Supp. 755, 758 (E.D.N.Y. 1978), and cases therein cited; *Barbarino v. Anchor Motor Freight, Inc.*, 421 F.Supp. 1003 (W.D.N.Y. 1976).

None of the cases cited by plaintiffs provides substantial support to their position to the contrary. The controversy in *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), *rev'g in part* Hines *v.* Local Union No. 377, Chauffeurs, Team., W. & H., 506 F.2d 1153 (6th Cir. 1974), arose not in New York, but in Ohio and Michigan, and the record is devoid of any suggestion that any statute of limitations was ever in issue. In *Abrams v. Carrier Corporation*, 434 F.2d 1234 (2nd Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971), the United States Court of Appeals for the Second Circuit did conclude that New York's six-year statute of limitations for actions "upon a contractual obligation" (*Id.*, at 1253, *quoting* New York's Civil Practice Law and Rules ("CPLR") § 213(2)) was appropriate to the unfair-representation suit then at issue. However, there had been no arbitration of that dispute and the court was careful to note that its holding was not automatically applicable to all suits brought under the "fair representa-

tion rubric," and that all the circumstances of any particular action would have to be examined to determine what period would be appropriate. *Id.*, at 1252 n.15. This court and a number of other federal district courts have concluded that the appropriate statute is CPLR § 7511 or its analogue. Not only is it the statute most specifically and obviously applicable to fair-representation suits seeking to overturn the decision of an arbitrator, but applying it to federal labor law also serves the same policies that the statute serves in state law matters. Arbitration, precisely because it offers a quick, sure and inexpensive route to resolution of disputes, is a major component—perhaps the most important single component—of federal labor law. *See, Steel Workers v. Warrier & Gulf Co.*, 363 U.S. 574 (1960). The admittedly brief 90-day statute of limitations provided in CPLR § 7511 serves to promote the use of arbitration in New York by decreasing the possibility that an arbitral award may be challenged. Adoption of this statute to suits under section 301 of the LMRA serves precisely the same important purpose. In *Auto Workers v. Hoosier Corp., supra*, the United States Supreme Court applied similar reasoning in deciding to apply a six-year statute of limitations instead of an also arguably applicable 20-year statute, noting that only a six-month statute of limitations applied to challenges of unfair-labor practice determinations (29 U.S.C. § 160(b)) and that rapid resolution of industrial suits was a goal of federal labor law. 383 U.S. at 707.[1]

Plaintiffs make two additional arguments in support of their position that they are not barred by CPLR § 7511. First, they claim that they are not seeking to

[1] Plaintiffs herein make no claim of fraud on the part of the Union or collusive behavior between the defendant unions and Bethlehem that they did not discover and could not reasonably have discovered within 90 days after the arbitrator's decision. If they had so alleged, substantially different policy considerations might have come into play.

vacate an award of an arbitrator. It is true that they make no such demand on the face of their Complaint. But the remedies they seek before me were sought before and denied by the arbitrator. Before I may award plaintiffs their requested relief, I must vacate the contrary decision of the arbitrator.

Second, plaintiffs claim that section 7511 is not applicable, as plaintiffs would, under New York labor law, have no standing under that section to contest an arbitrator's award. This argument must fail on the fundamental grounds that federal and not state law controls suits under section 301 and that plaintiffs clearly have standing under that section. *Hines* v. *Anchor Motor Freight, supra. Auto Workers* v. *Hoosier Corp., supra,* applies only the chronological requirements of state law, in the absence of a federal legislative standard. 383 U.S. at 703-04. It applies no other state law standards. *See, Wallace v. American Tel. & Tel. Co., Inc., supra,* at 575.

For the reasons hereinabove stated, defendants' motion to dismiss must be and accordingly is hereby ORDERED granted.

Dated: Buffalo, N.Y.
Dated: November 29, 1979

/s/ John T. Elfvin
U.S.D.J.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action File No. 79-40

DONALD C. FLOWERS & KING E. JONES

vs.

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA

&

UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL

&

BETHLEHEM STEEL CORPORATION

JUDGMENT

This action came on for (hearing) before the Court, Honorable John T. Elfvin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged.

The defendants' motion to dismiss is granted.

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-893

UNITED STEELWORKERS OF AMERICA AND ITS LOCAL 2602, AFL-CIO-CLC,

Petitioners

v.

DONALD C. FLOWERS and KING E. JONES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 1, 1982.

/s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 21st day of April, 1982.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-893

UNITED STEELWORKERS OF AMERICA AND ITS LOCAL 2602, AFL-CIO-CLC,

Petitioners

v.

DONALD C. FLOWERS and KING E. JONES

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including July 1, 1982.

/s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 20th day of May, 1982.

APPENDIX I

STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, provides in pertinent part as follows:

Section 7 [29 U.S.C. § 157]:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 [29 U.S.C. § 158]:

Unfair Labor Practices.

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 9 [29 U.S.C. § 159]:

Representatives and elections.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10 [29 U.S.C. § 160]:

Prevention of Unfair labor practices.

* * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency desig-

nated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 7511(a) of the New York Civil Practice Laws and Rules, CPLR § 7511(a) (McKinney), provides as follows:

> An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

Section 214(6) of the New York Civil Practice Laws and Rules, CPLR § 214(6) provides in pertinent part as follows:

The following actions must be commenced within three years:

* * * *

> 6. an action to recover damages for malpractice; . . .

APPENDIX J

PENDING DUTY OF FAIR REPRESENTATION CASES IN WHICH A TIMELINESS ISSUE HAS BEEN RAISED BUT NOT DECIDED, AND AS TO WHICH REVERSAL OF THE COURT BELOW ON THE ISSUES PRESENTED HERE WOULD BE DISPOSITIVE

Acri v. Machinists, C-82-0340, N.D. Cal.
Adkins v. General Motors, C-3-82-011, S.D. Ohio
Anderson v. Machinists Dist. 100, 81-631, 7th Dist. Ct. of Fla.
Barina v. Maritine Union, 81-3722 CBM (JRx), C.D. Cal.
Barnett v. Ford Motor, 81-0783-CU-W-1, W.D. Mo.
Bennett v. Roadway, 82-3020-CU-S2, W.D. Mo.
Bernardini v. Bethlehem Steel, 80-82, W.D.N.Y.
Blonstein v. Sea Land Services, Inc., 82 166, D. N.J.
Bortz v. Ingersoll-Rand, 82-514, D.N.J.
Branch v. Hobbs, 4-82-151-E, N.D. Tex.
Brice v. McDonnel Douglas, 81-3985R, C.D. Cal.
Brophy v. McLean Trucking Co., M 81 2197, D. Md.
Bryan v. Machinists Local 709, C82-379A, N.D. Ga.
Butler v. Government Employees, C81-482, N.D. Ohio
Burgess v. Paperworkers, CV 181-236, S.D. Ga.
Canavan v. Carter, 81-703C(1), E.D. Mo.
Chandler v. Oberle-Jordre, 81-139, E.D. Ky.
Claudio v. Arrow Aluminum, C82-60, N.D. Ohio
Collins v. American Freight System, 81-1602-CU-W-3, W.D. Mo.
DeAngeliss v. N.Y. Telephone Co., 81 Civ. 7305, S.D.N.Y.
Delgado v. McDonnel Douglas, 81-3319 WPG, C.D. Cal.
Dones v. Machinists, 77-7384 (907), El Tribunal Superior de P.R., Sala de San Juan
Dutissac v. Machinists, 81-4251, 9th Cir.
Ely v. Duriron Co., C-3-81-402, S.D. Ohio
Folk v. Standard Steel, 81-1456, M.D. Pa.
Folsom v. Spector Freight, 82-0321-CU-W-9, W.D. Mo.
Gillespie v. HPM Corp., C-2-80-979, S.D. Ohio

Gustafson v. Cornelius Co., 82-1199, 8th Cir.
Hart v. Kroger Co., 81-1547-C(A), E.D. Mo.
Harvey v. Boise Cascade Corp., C 80 128, E.D. Wash.
Hole v. Machinists, C-81-1004A, N.D. Ohio
Kepler v. Koppers Co., 82-1181, D. Md.
Kulman v. Norway Gravure, M82-67CA, W.D. Mich.
Lambert v. General Foods Corp., IP 811355C, S.D. Ind.
Lambert v. Union Boiler, C-2-80-280, S.D. Ohio
Lasch v. Seafarers, M81-185, W.D. Mich.
Leary v. Western Union Telegraph Co. & CWA, 81 Civ. 0946, S.D.N.Y.
Main v. General Motors Corp., 81-2051, D.Kansas
Manowski v. Seafarers, K81-2499, D. Md.
Mattera v. Teamsters 449, 81-97E, W.D.N.Y.
Maye v. Nitec Paper Corp., 82-181, W.D.N.Y.
Mitchell v. Teamsters Local 449, 82-118C, W.D.N.Y.
Montrose v. Office and Professional Employees Local 320, 79-1017-CU-W-4, W.D. Mo.
Opal Lee Conn v. National Can Corp., Docket # 162135, Sup. Ct. of Cal., Stanislaus
Pawlowski v. Dresser Clark, 81-1078, W.D.N.Y.
Perez v. Maline Corp., 82-0025, E.D. Ill.
Raub, v. Seafarers, 82-1432, E.D. Pa.
Rios v. Autoworkers Local 148, CV-81-5905, MML, C.D. Cal.
Saba v. Pic-N-Pay Supermarkets, C81-423, N.D. Ohio
Sabey v. Steelworkers, 81-80, W.D.N.Y.
Snipes v. Douglas Aircraft, 82-1918 MRP, C.D. Cal.
Stone v. Ryder Trucklines, 8-82-0017, S.D. Tex.
Surgest v. Shenango, 81-112, W.D. Pa.
Vasquez v. Amalgamated Industrial Union, N-80-159, D. Conn.
Vourloumis v. Seafarers, 81-1720, E.D. Pa.
Vourloumis v. Seafarers, 81-4697, E.D. Pa.
Walling v. Machinists, 81-2121, 7th Dist. Ct. of Fla.
Ward v. Alside, Inc., C79-1262A, N.D. Ohio
Weed v. East Texas Motor, CA3-79-0881-G, N.D. Tex.
Zigman v. NuCar Carrier, New York Supreme Court

APPENDIX K

[Unpublished]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-2086

PHILIP DELCOSTELLO,
Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendant,

and

LOCAL 577, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and ANCHOR MOTOR FREIGHT, INC.,
Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Shirley B. Jones, District Judge

Argued March 30, 1982 Decided April 19, 1982

Before WINTER, Chief Judge, BRYAN, Senior Circuit Judge, and HALL, Circuit Judge.

William H. Zinman; Richard P. Neuworth for Appellant; Bernard S. Goldfarb (Karen N. Moellenberg, Goldfarb & Reznick on brief) for Appellee Anchor Motor Freight, Inc.; Carl S. Yaller (Bernard W. Rubenstein, Edelman and Rubenstein, P.A. on brief) for Appellee Freight Drivers and Helpers, Local 557; (Gerard P. Martin, Melnicove, Kaufman and Weiner, P.A. on brief) for Appellees.

PER CURIAM:

After plaintiff unsuccessfully submitted his claim for wrongful discharge to binding arbitration under a collective bargaining agreement, he sued his former employer, alleging wrongful discharge in breach of contract, and his union, alleging breach of the duty of fair representation. The arbitrators' award in favor of the employer was made on July 18, 1977, and plaintiff received a copy several days later. Suit was not instituted until March 16, 1978.

Relying upon United Parcel Service v. Mitchell, 451 U.S. 56 (1981), the district court dismissed the suit and ruled that it was barred as to both the employer and the union by the thirty-day limitations period contained in Md. Code Ann., Cts. and Jud. Proc. § 3-224 (Repl. Vol. 1980).

We think that the district court was correct in its conclusion, and we affirm on the basis of its memorandum and order. *See* Delcostello v. International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, Civil Action No. J-78-436 (D. Md., Oct. 22, 1981).

AFFIRMED.

Office-Supreme Court, U.S.
FILED
MAR 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-2408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

v.

DONALD C. FLOWERS and KING E. JONES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 1, 1982
CERTIORARI GRANTED NOVEMBER 29, 1982

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RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

DATE	NR.	PROCEEDINGS
1979		
Jan 19	1	Filed complaint
19		Issued summons & 3 copies
19		Js 5 made
Mar 1	2	Filed summons & Mar. ret. served on U. Steel Workers of America International on 1/29/79; Local 2602 of the United Steel Workers of America on 2/22/79; Bethlehem Steel Corp on 2/22/79
23	3	Filed deft USWA and Local 2602 notice of motion and motion to dismiss the complaint with supporting memorandum ret. April 23, 1979.
Apr 13	5	Filed deft Bethlehem Steel Corp notice of motion and motion to dismiss complaint. ret. Apr 23, 1979.
May 21		Ct. heard argument on defts. motions to dismiss, decision reserved, (not recorded)
Dec 3	6	Filed Memorandum & Order to grant deft's motion to dismiss.—Elfvin, D.J. Notices mailed. F-219
5	7	Filed Judgment on decision by the Court.—Clerk. Mailed notices JS 6 made F-219.
1980		
Jan. 3	8	Filed Pltfs'. Notice of Appeal (copy mailed to Messrs. Giroux and Schroeder and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Kedzielawa)

RELEVANT DOCKET ENTRIES IN THE COURT OF APPEALS

DATE	FILINGS—PROCEEDINGS
1/7/80	Copies of docket entries and notice of appeal on behalf of appellants Flowers and Jones filed
3/21/80	Case submitted before: Lumbard, Mulligan, Oakes, C.JJ.
7/15/80	Notice of filing of petition for writ of certiorari filed (S.C. #80-26)
5/7/81	Notice from Supreme Court granting petition for writ of certiorari and remanding case to the Court of Appeals filed
6/8/81	Certified copy of Supreme Court order granting petition for writ of certiorari filed. (SC #80-26)
6/8/81	Certified copy of Supreme Court order vacating judgment of this Court and remanding cause for further consideration in light of *UPS* v. *Mitchell* 451 U.S. —— (1981); further ordered that United Steelworkers recover from Flowers $200.00 for their costs herein expended filed.
6/9/81	Ordered that the judgment of this court of March 24, 1980 be and it hereby is vacated and that petitioners, United Steel Workers of America et al., recover from Donald C. Flowers, et al., Two Hundred Dollars (200.00) for their costs expended in the Supreme Court of the United States, filed
7/20/81	Ordered that the parties shall brief the question whether the language of UPS, Inc. v. Mitchell, applies to the duty of fair representation claim made in the Flowers case or as the Hon. John Paul Stevens assers is or should be limited to the breach of contract claim. Briefs shall not exceed 5 typewritten pages and may be in letter form. Appellants Brief: 8/21/81, Appellees Brief: 9/10/81 Further ordered that this action shall be taken on submission by this panel. (JEL, JLO)

DATE	FILINGS—PROCEEDINGS
2-1-82	Judgment affirmed in part and reversed in part, published opinion, Oak
2-1-82	Judgment filed.
2-24-82	Mandate (Judgment, Opinion) issued.
7-12-82	Notice of filing petition for writ of certiorari filed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil No. 79-40

DONALD C. FLOWERS
78 Wiesner Road
Lackawanna, New York

and

KING E. JONES
96 Alexander Place
Buffalo, New York,

Plaintiffs,

v.

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA,

and

UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL,

and

BETHLEHEM STEEL CORPORATION,

Defendants.

COMPLAINT

The Plaintiffs, by their attorneys, LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, complaining of the Defendants herein allege:

JURISDICTION

1. This is an action brought by two employees (craftsmen welders), who seek to remedy a wrongful denial by the Employer-Defendant of employment, wages and attendant benefits for the performance of available craft

work, preserved for them by a collective bargaining agreement in force at the time of the violations herein alleged. At the direction of the Employer-Defendant, such work was performed by non-craftsmen welders, in violation of several provisions of the collective bargaining agreement, which these Plaintiffs herein seek to enforce.

2. This action is also brought by these two employees against their collective bargaining representatives, Local 2602 of the United Steel Workers of America, hereinafter referred to as "Local 2602", and against the International Representative of Local 2602, the United Steel Workers of America, International, for breach of their duty to fairly represent these two employees under Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a).

3. This action against all Defendants presents special federal questions under, and jurisdiction is founded upon, Section 301 of the Labor Management Relations Act of 1947, c.120, Title III, Section 301, 61 Stats. 156, 29 U.S.C.A. § 185, as amended, without respect to amount in controversy or diversity of citizenship of the parties.

PARTIES

4. Plaintiff, Donald Flowers, is an individual residing at 78 Weisner Road, Lackawanna, New York. At all times material to this action, he was an employee of the Bethlehem Steel Corporation at the Lackawanna, New York, plant, and he was a member of Local 2602.

5. Plaintiff, King E. Jones, is an individual residing at 98 Alexander Place, Buffalo, New York. At all times material to this action, he was an employee of the Bethlehem Steel Corporation at the Lackawanna, New York, plant, and he was a member of Local 2602.

6. Defendant, Local 2602, with a principal place of business at Ridge Road, Lackawanna, New York, and the United Steel Workers of America, International, with a

principal place of business at Five Gateway Center, Pittsburgh, Pennsylvania, are unincorporated associations and at all times material to this claim were "labor organizations" under LMRA § 501(3), and are the exclusive bargaining representatives of certain employees of this Employer-Defendant, including these Plaintiffs, pursuant to a collective bargaining agreement between Local 2602 and the International with this Employer-Defendant, dated August 1, 1974 through August 1, 1977.

7. The Employer-Defendant, Bethlehem Steel Corporation, is a corporation doing business in the State of New York, with a principal place of business in Lackawanna, New York, and at all times material to this claim was and is engaged in an industry substantially affecting interstate commerce within the meaning of the Labor Management Relations Act, § 501.

VENUE

8. Venue for this action lies in the United States District Court for the Western District of New York, the district where the claim arose, 28 U.S.C. § 1391(b). The Defendant-Corporate Employer does business in that district, 28 U.S.C. § 1391(c). The United States District Court for the Western District of New York is deemed to have jurisdiction over a labor organization in the district in which such organization maintains its principal office (Local 2602), or in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members (International), LMRA § 301(c), 29 U.S.C. § 185(c).

FACTUAL ALLEGATIONS

9. At all times material to this claim, the Plaintiffs were employees of the Defendant, Bethlehem Steel Corporation, and were dues paying members of Local 2602 of the United Steel Workers of America, and of the United Steel Workers of America, International.

10. Plaintiffs were craftsmen welders and were traditionally assigned to the Employer's Garage Department (Department No. 342), at all times material to this claim.

11. The Plaintiffs' respective seniority dates are, for the Plaintiff, Donald Flowers, February 18, 1959, and for the Plaintiff, King E. Jones, August 24, 1966.

12. Donald Flowers has been laid off or erroneously reassigned as of November 8, 1975. King E. Jones has been laid off or erroneously reassigned on or about the same date.

COUNT I

13. The Employer had a collective bargaining agreement with the United Steel Workers of America, from August 1, 1974, until August 1, 1977, which was subscribed to by Local 2602.

14. While either one or both Plaintiffs were laid off or assigned to non-craftsmen welder work, the Employer had craftsmen welder work performed by non-craftsmen welders in the 461 Department, and/or by the mobile equipment mechanics, and/or by other non-craftsmen welders, and/or by contracting out such work.

15. There was sufficient craftsmen welder work for Plaintiffs to perform during the period of their layoffs or reassignment.

16. The Employer's refusal to assign or recall either or both of the Plaintiffs to perform such work was in violation of the following provisions of the collective bargaining agreement:

Article II, Section 1(d)—Race Discrimination
Article V—Job Classifications and Incentives
Article X—Seniority
Article XI—Adjustment of Grievances
Article XIII—Management Functions
Article XIV—Safety and Health

17. The Employer's failure to assign or recall either or both of the Plaintiffs to perform craftsmen welder work created numerous safety hazzards and endangered the safety, health and physical well-being of the Employer's work force.

18. Unclassified, non-craftsmen welders were assigned by the Employer to perform craftsmen welder work.

19. At least 10 or 12 of the unskilled, non-craftsmen welders (mobile equipment mechanics) who had been assigned craftsmen welding work during the period of the Plaintiffs' layoff and/or recall, had previously taken the craftsmen welding test and had failed.

20. The Employer's failure to assign or recall either or both of the Plaintiffs to perform craftsmen welder work was in violation of various safety rules, procedures and practices of the Employer.

COUNT II

21. The Plaintiffs filed four grievances concerning these violations, Grievances No. 74-08206, 74-08213, 74-08512, 74-10215.

22. The matter proceeded to arbitration on September 8, 1977. The arbitrator was Joseph M. Sharnoff. The Employer was represented, principally, by Donald S. Bauman, Esq. The grievants were represented by Local 2602 International Staff Representative Sal Amarante.

23. The arbitrator denied the above grievances in an award dated February 24, 1978.

24. That award is not binding upon the Plaintiffs because of the inept and haphazard manner in which the representative for Local 2602 and the International (Amarante) handled the above arbitration.

25. Amarante, on behalf of Local 2602 and the International, failed to adequately prepare for the arbitration

and engaged in little or no investigation of the facts comprising this arbitration.

26. Amarante, on behalf of Local 2602 and the International, was not merely negligent, but was reckless, careless and failed to give due consideration with respect to his preparation, investigation and handling of this arbitration.

27. Amarante's conduct in handling this arbitration is only one incident in a pattern or practice of conduct engaged in by Local 2602 since approximately 1971-1972 whereby Local 2602 has arbitrarily and capriciously failed to fully and timely prosecute meritorious grievances filed by 2602 members.

28. Amarante, acting on behalf of Local 2602 and the International, knowingly failed to call qualified and available union witnesses to testify as to essential, relevant and material matters during the arbitration hearing.

29. Amarante, acting on behalf of Local 2602 and the International, arbitrarily and capriciously failed to have testify numerous union witnesses, whose testimony was of significant importance to an adequate presentation of the grievances.

30. Amarante, acting on behalf of Local 2602 and the International, failed to adequately question those union witnesses who did testify.

31. Amarante's questioning of the union and company witnesses failed to adequately disclose the Employer's breach of the collective bargaining agreement and safety procedures, rules and practices. He failed to effectively cross examine company witnesses and failed to effectively examine union witnesses.

32. During the course of the arbitration hearing, Amarante failed to present competent, relevant, material and available and known evidence of the Employer's

breach of the collective bargaining agreement and safety regulations, policies and practices.

33. Such evidence was offered to Amarante by the grievants and other union members of Local 2602, but Amarante, without justification or reason, refused to present, or otherwise utilize such known and available evidence of the Employer's breach of the collective bargaining agreement.

34. Amarante's preparation, investigation and handling of this investigation was so inept and careless as to be arbitrary and capricious, denying the Plaintiffs a fair hearing on their grievance. Because of Amarante's inept handling of this arbitration, Local 2602 and the International consequently breached the duty of fair representation, which they owed to the Plaintiffs, all in violation of Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 195(a).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court assume jurisdiction of this cause, and:

(a) Order the Defendant-Employer to account for all wages, benefits and increments, which the Plaintiffs would have received, from the dates of their unlawful layoff or reassignments, respectively, to the date of this Order.

(b) Order all of the Defendants to reimburse or compensate the Plaintiffs for all damages suffered by them as a result of the Employer's breach of the collective bargaining agreement and Local 2602's and the International's breach of their duty of fair representation.

(c) Apportion the imposition of liability and the damages to be paid by each Defendant, as the Court deems just.

(d) To enjoin the Defendant-Employer from continuing in his violations of the collective bargaining agreement, as hereinabove alleged.

(e) Allow Plaintiffs their costs herein, as well as attorneys fees, and grant to Plaintiffs such further and alternative relief as this Court may deem to be just and appropriate.

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES

/s/ Eugene W. Salisbury
EUGENE W. SALISBURY, ESQ.
FRANK S. KEDZIELAWA, ESQ.
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DATED: Buffalo, New York
January 17, 1979

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ. 79-40

DONALD C. FLOWERS
78 Wiesner Road
Lackawanna, New York

-and-

KING E. JONES
96 Alexander Place
Buffalo, New York,

Plaintiffs

vs

LOCAL 2602 UNITED STEELWORKERS OF AMERICA, and UNITED STEELWORKERS OF AMERICA INTERNATIONAL, and BETHLEHEM STEEL CORPORATION,

Defendants

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT

SIRS:

PLEASE TAKE NOTICE, that the United Steelworkers of America, AFL-CIO, and the United Steelworkers of America Local 2602, by their attorneys McMahon & Crotty (Thomas P. McMahon, Esq, and E. Joseph Giroux, Jr., Esq. of counsel) will move this Court at a term thereof to be held at the United States Courthouse in the City of Buffalo, New York, at Part II of said Court, on the 20th day of April, 1979, at 9:00 o'clock in the forenoon of that date or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12(b)(6) dismissing the complaint in this action, on the grounds that the complaint fails to state a claim upon which relief can be granted in that the claims set forth in the complaint arose more than ninety (90) days prior to the filing of the

complaint and are, therefore, barred by the applicable Statute of Limitations as set forth in Section 7511(a) of the New York Civil Practice Law and Rules.

This motion is made upon the attached memorandum and exhibits and the complaint in the case.

DATED: Buffalo, New York,
March 15th, 1979

Yours, etc.,

McMAHON & CROTTY

BY: /s/ E. Joseph Giroux, Jr.
E. JOSEPH GIROUX, JR.
Attorneys for Defendants USWA and
Local 2602 USWA
Office and P.O. Address
1028 Liberty Bank Building
Buffalo, New York 14202

TO:

LIPSITZ, GREEN, FAHRINGER,
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One Niagara Square
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DONALD BAUMAN
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Bethlehem Steel
Bethlehem Steel Corporation
Martin Tower
Bethlehem, Pennsylvania 18016

EXHIBIT TO MOTION OF DEFENDANT UNIONS TO DISMISS COMPLAINT

Exhibit 1—Article XI—Adjustment of Grievances, Collective Bargaining Agreement attached to U.S.W. Motion.

ARTICLE XI—ADJUSTMENT OF COMPLAINTS AND GRIEVANCES

Section 1. Purpose

(a) Should any differences arise between the Company and the Union as to the meaning and application of the provisions of this Agreement or as to any question relating to the wages, hours of work and other conditions of employment of any Employee, there shall not be any suspension of work on account of such differences, but an earnest effort shall be made to settle them promptly and in accordance with the provisions of this Agreement in the manner hereinafter set forth.

(b) *Definitions:* When used herein, the following terms have the meanings indicated:

1. The term "complaint," as used in Sections 1 and 2 of this Article, shall be interpreted to mean a request or complaint.

2. The term "superintendent" shall mean the department superintendent or his designated representative from his office if the department superintendent is unavailable.

3. The term "Management's Representative" shall mean the Plant Management's Representative or his designated representative from his office.

4. The term "Grievance Committeeman" shall mean the Grievance Committeeman or his designated representative if the Grievance Committeeman is unavailable.

(c) *Failure to Appeal:* If the decision of the Company representative in any Step of the complaint and grievance procedure with respect to a complaint or grievance shall not be appealed to the next Step within the time specified for such appeal, such complaint or grievance shall be considered settled on the basis of the decision made by the Company representative, and the Employee or Employees covered by such complaint or grievance shall not have any further right or remedy with respect to any claim or matter covered by such complaint or grievance.

(d) *Presenting the Complaint:* Except as otherwise expressly provided in this Agreement, any complaint to be considered in the complaint and grievance procedure shall be discussed with the foreman within 30 calendar days, after the date on which the facts or events upon which the complaint is based shall have existed or reasonably should have become known to the Employee or Employees affected thereby; provided, however, that any request for any change in any of the terms or provisions of this Agreement shall not be handled in this procedure for adjustment of complaints and grievances.

(e) *Modification at Plant Level:* The procedural steps for the settlement of complaints or grievances hereinafter in this Article set forth shall constitute a general standard which may be modified at any Plant by agreement between the Management and the Union, if, in the interest of prompt and orderly settlement of complaints or grievances, it shall be deemed advisable that such procedural steps be so modified.

Section 2. Procedure

STEP No. 1—ORAL

Discussion with Foreman: If an Employee believes that he has a justifiable complaint, he may discuss such complaint with his foreman, with or without an Assistant Grievance Committeeman employed in the designated

area being present, as he may elect, in an attempt to settle the matter. Any such Employee may, however, if he so desires, report the matter directly to such Assistant Grievance Committeeman and in such event such Assistant Grievance Committeeman, if he believes the complaint merits discussion, shall take it up with the Employee's foreman in a sincere effort to resolve the problem. The Employee involved shall be present in such discussion.

Additional Representatives: If the parties, after full discussion, feel the need for aid in arriving at a solution, they may by agreement invite such additional Management or Union representatives or witnesses from the Plant as may be necessary and available to participate in further discussion, but such additional representatives shall not relieve the local participants from responsibility to arrive at a solution of the complaint.

Authority of Parties: The foreman shall have the authority to settle the complaint. The Assistant Grievance Committeeman shall have the authority to settle, withdraw or appeal the complaint.

Discussion and Response: The foreman shall at the end of the final Step No. 1 meeting give his response to the complaint. Only if additional information or facts are necessary may the response be delayed, but not for more than 3 days (excluding Saturdays, Sundays and holidays) after the final meeting. If the complaint is not settled in the forgoing procedure, an Appeal Form shall be prepared by the foreman. Upon request, two copies of the Appeal Form shall be furnished to the Assistant Grievance Committeeman from the designated area and it shall be signed by the affected Employee or Employees. The Appeal Form must contain the following information:

Appeal Form

Name .....
Badge No. .....
Department .....
Type of complaint .....
Date of initial complaint with foreman .....
Date of foreman's oral response .....
Date settled .....
Date withdrawn .....
Date appealed to Step No. 2 .....
Foreman's signature .....
Grievance Committeeman's signature .....
Signature of Affected Employee(s) .....
Date of Step No. 2 Disposition .....
Superintendent's signature .....
Date Received by Assistant Grievance Committeeman ...
Assistant Grievance Committeeman's signature .....

Purpose, Withdrawal: The foregoing procedure of direct communication and discussion should result in a full disclosure of facts and should lead to a fair and speedy solution of most of the complaints arising out of the day-to-day operations of the Plant. The settlement of a complaint in Step No. 1 shall be without prejudice to the position of either party. If the complaint concerns only the rights of the individual or individuals involved, and its settlement will have no adverse effect on the rights of other Employees, the individual or individuals involved may withdraw the complaint.

Appeal to Step No. 2: If the complaint is not settled in Step No. 1 and the Assistant Grievance Committeeman from the designated area determines that it constitutes a meritorious complaint, he may appeal it to Step No. 2 by making the appropriate notation on the Appeal Form

and furnishing the superintendent with a copy of such Appeal Form.

Unless such complaint shall be appealed to such superintendent with 7 calendar days (excluding Saturdays, Sundays and holidays) after receipt of the Appeal Form by the Assistant Grievance Committeeman from the designated area from such foreman, such complaint shall be deemed to have been settled in accordance with the Step No. 1 disposition.

STEP NO. 2—ORAL

Discussions and Processing: If such complaint shall be so appealed it shall be discussed in an effort to settle it between a Grievance Committeeman and the superintendent. The Grievance Committeeman and the superintendent shall be responsible for conducting a Step No. 2 discussion. Other Step No. 2 participants shall include the Employee and the foreman involved and such other witnesses whom they may, by agreement, invite. Such additional participants shall not relieve the superintendent and the Grievance Committeeman from responsibility to arrive at a solution of the complaint. The discussion shall be held and such superintendent shall dispose of such complaint within not more than 7 calendar days (excluding Saturdays, Sundays and holidays) after the date on which such complaint shall have been so appealed to such superintendent.

Authority of Parties: The superintendent shall have authority to settle the complaint. The Grievance Committeeman shall have the authority to settle, withdraw or appeal the complaint.

If the complaint is settled in Step No. 2, a written notification of the disposition of such complaint shall be made on the Appeal form. The resolution of a complaint in Step No. 2 shall be without prejudice to the position of either party.

Grievance Record and Appeal: If the complaint is not resolved in Step No. 2, the oral disposition and the date thereof shall be noted on the Appeal Form, two copies of which shall be furnished to the Grievance Committeeman on the date of such oral disposition. The Grievance Committeeman may file with the superintendent within 2 calendar days (excluding Saturdays, Sundays and holidays) of receipt of the Appeal Form, a written statement of the grievance. The Grievance Committeeman and the superintendent shall within 5 calendar days (excluding Saturdays, Sundays and holidays) of the receipt by the superintendent of the written statement of the grievance jointly develop a written grievance record (hereinafter referred to as the grievance record).

The grievance record shall contain a statement of the grievance (prepared by the Grievance Committeeman), all agreed-to facts, all facts disputed by either party, contractual reliance, the remedy sought, and the response and reason for the position of the superintendent. If such grievance is not settled through the development of the grievance record, the Grievance Committeeman may within 5 calendar days (excluding Saturdays, Sundays and holidays) of receipt of the grievance record appeal the grievance and grievance record to Step No. 3 of the procedure.

Complaints Occurring Under More Than One Foreman: Complaints which allege violations directly affecting only the Employees working under a particular department superintendent but under more than one foreman shall be initiated in Step No. 2 and be processed in accordance with the foregoing Step No. 2 procedure.

STEP NO. 3—WRITTEN

Discussion: A grievance which shall not be settled by the procedure prescribed in the foregoing Step No. 2 shall be discussed promptly at a mutually satisfactory time between the Management's Representative and the

Grievance Committee and a Local Union representative as the Committee may select. At any meeting with the Grievance Committee the Management's Representative may be accompanied by such other representatives of the Management as he shall select.

Time of Discussions and Appeal: Unless otherwise agreed, such grievance shall be discussed at a Step No. 3 meeting which shall be held not later than 9 calendar days (excluding Saturdays, Sundays and holidays) after such grievance shall have been presented to the Management's Representative. If the Management's Representative shall fail to provide an opportunity for discussion of such grievance within such 9 calendar days (excluding Saturdays, Sundays and holidays) such grievance may be appealed to Step No. 4, unless an extension of time shall have been mutually agreed upon.

Incomplete Grievance Record: No grievance appealed from Step No. 2 shall be considered in Step No. 3 in the absence of a full grievance record, unless the facts are not available to the Step No. 2 participants. If additional facts are needed the grievance shall be referred back for further consideration or discussion in the appropriate prior step. The time limits as set forth in Step No. 2 will apply.

In the case of grievances filed directly in Step No. 3, either party may call witnesses whose attendance shall be limited to time required for their testimony.

Authority of Parties: The Management's Representative shall have the authority to settle any grievance before him. The Grievance Committee shall have the authority to settle or withdraw any grievance.

Minutes of Meeting: Minutes of each meeting under this Step No. 3 shall be prepared by the Management's Representative and shall be signed by the chairman or secretary of the Grievance Committee and the Management's Representative not later than 10 calendar days

after the date on which such meeting shall have been held. Such minutes shall be typewritten and shall conform substantially to the following outline:

(a) Date and place of meeting.

(b) Names and positions of those present.

(c) Identifying number and description of each grievance discussed.

(d) Brief statement of the facts and the Union's position with regard to each grievance.

(e) Brief statement of the facts and the Company's position with regard to each grievance.

(f) Action taken at such meeting with regard to each grievance.

(g) Statement as to whether or not the Union concurred in such action and of any exceptions taken by the Union thereto.

The Step No. 3 minutes need not duplicate the information contained in the grievance record developed in Step No. 2 and the Step No. 3 minutes shall be added to and form a part of the grievance record.

Appeal and Settlement: If an appeal from the action taken with regard to any grievance in accordance with the procedure under this Step No. 3 as shown in the grievance record of the meeting at which such action shall have been taken shall not be made within 30 calendar days after the date of such meeting or within 20 calendar days after a draft of the minutes of such meeting shall first have been received by a representative of the Union, whichever of those periods shall last expire, such grievance shall be deemed to have been settled in accordance with such action and no appeal therefrom shall thereafter be taken. In exceptional cases, however, where the Union can satisfactorily demonstrate that the failure of the Union representative charged with the responsibility for such appeal

was caused by conditions justifiable under the circumstances and does, in fact, appeal within 10 days from the date of the default, the appeal shall be accepted as though it had been timely. The Company's liability for any retroactive payments resulting from the application of the preceding sentence shall exclude the period of the delay in the appeal.

Multi-Department Grievances: Grievances which allege violations directly affecting Employees working under more than one department superintendent shall be initiated in Step No. 3 and, if discussion fails to settle a grievance, the Step No. 3 representatives shall develop the grievance record and it shall be processed in accordance with the foregoing Step No. 3 procedure.

STEP NO. 4—WRITTEN

Step No. 4 Representation: Any complaint or grievance which shall not be settled by the procedure prescribed in the foregoing Steps Nos. 1, 2, and 3 shall be discussed in an attempt to reach a mutually satisfactory settlement thereof between two representatives of the International Union who shall be certified to the Company in writing as the representatives selected by the Union for the purpose and two representatives of the Company who shall be similarly certified by the Company to the Union and may also include a Plant representative of the Union if the Company is represented by a Plant representative. Notice of the intention of either party to take up a grievance under this Step No. 4 shall be given to the other party in writing within 30 calendar days after the date of the meeting under Step No. 3 at which action with regard to such grievance shall have been taken or within 20 calendar days after a draft of the minutes of such meeting shall first have been received by a representative of the Union, whichever of those periods shall last expire.

A grievance shall not be processed in this step until a full grievance record has been developed. In the event

that a complete record has not been developed, the grievance shall be referred back for further consideration in Step No. 2 or Step No. 3 of the procedure.

Notice of Appeal: In order for a grievance to be considered in Step No. 4, the notice appealing it shall be in writing signed by a certified representative of the International Union assigned to the Plant and given to the Management's Step No. 4 representative.

Time and Place: Except as otherwise agreed by the Company and the Union, meetings which shall be required under this Step No. 4 shall be held at Bethlehem, Pa. within 60 calendar days after receipt of the appeal to Step No. 4 in accordance with the preceding paragraph and the number of such meetings and any other procedure which may aid in the effort to reach a satisfactory settlement of any grievance shall be agreed upon between the certified representatives of the Company and the certified representatives of the Union.

Authority of Parties: The certified Company representatives shall have the authority to settle this grievance. The certified representatives of the International Union shall have the authority to settle, withdraw or appeal the grievance to arbitration.

Minutes of Meeting: Minutes of each meeting for the discussion of grievances under this Step No. 4 shall be prepared by the certified representatives of the Company (and when appropriate shall reflect changes in the positions of the parties) and shall be signed by them and the representatives of the Union within 30 calendar days after such meeting shall be held.

Time Limits on Appeal: If an appeal from the action taken with regard to any grievance in accordance with the procedure under this Step No. 4 as shown in the minutes of the meeting at which such action shall have been taken shall not be made within 30 calendar days

after the date of the meeting or within 20 calendar days after a draft of the minutes of such meeting shall first have been received by a certified representative of the Union, whichever of these periods shall last expire, such grievance shall be deemed to have been settled in accordance with such action and no appeal therefrom shall thereafter be taken.

Section 3. Unresolved Step No. 4 Cases

(a) *Appeals to Arbitration:* The foregoing procedure, if followed in good faith by both parties, should be adequate to reach a fair and expeditious settlement of any complaint or grievance. In the event, however, that the procedure hereinbefore in Section 2 of this Article set forth shall have been followed in respect of any complaint or subsequent grievance and such grievance shall not thereby have been satisfactorily settled and if such grievance shall involve the meaning and application of the provisions of this Agreement, it may be appealed by giving notice in writing to the Company, within 30 calendar days after the date of the meeting at which discussion of such grievance under Step No. 4 shall have been completed, or within 20 calendar days after a draft of the minutes of such meeting shall first have been received by a certified representative of the Union, whichever of those periods shall last expire, and to an impartial umpire to be appointed by mutual agreement of the parties hereto.

(b) *Pre-Hearing Briefing Procedure*

(1) *General*

Not later than 50 days prior to the commencement of the arbitration hearing at which a grievance is scheduled to be heard, the Union's Step No. 4 representative shall file with the impartial umpire, the Manager of Labor Relations of the Company and the Director of the Contract Administration Depart-

ment of the Union, a pre-hearing brief setting forth the Union's position with respect to such grievance. The Manager of Labor Relations shall file with the impartial umpire, the Union's Step No. 4 representative and the Director of the Contract Administration Department of the Union, a pre-hearing brief setting forth the Company's position with respect to such grievance not later than 20 days prior to the commencement of such hearing; provided, however, in respect of grievances concerning disciplinary suspension, the Manager of Labor Relations of the Company, not later than 50 days prior to the commencement of the arbitration hearing at which such a grievance is to be heard, shall file with the impartial umpire, the Union's Step No. 4 representative and the Director of the Contract Administration Department of the Union, a pre-hearing brief setting forth the Company's position with respect to such grievance. The Union's Step No. 4 representative shall file with the Manager of Labor Relations of the Company, the Director of the Contract Administration Department of the Union and the impartial umpire, a pre-hearing brief setting forth the Union's position with respect to such grievance not later than 20 days prior to the commencement of such hearing. The Manager of Labor Relations shall, promptly after the appeal to arbitration of disciplinary suspension grievances, send to the impartial umpire and to the Director of the Contract Administration Department of the Union copies of the Steps Nos. 3 and 4 minutes relating to such grievances.

(2) *Discharge Grievances*

Within 15 calendar days after receipt of the Union's written notice of appeal of an Employee's discharge to the impartial umpire, the Manager of Labor Relations of the Company shall file with the impartial umpire, the Union's Step No. 4 represen-

tative and the Director of the Contract Administration Department of the Union a pre-hearing brief setting forth the Company's position with respect to such grievance, and the Union's Step No. 4 representative shall file with the Manager of Labor Relations of the Company, the Director of the Contract Administration Department of the Union and the impartial umpire a pre-hearing brief setting forth the Union's position with respect to such grievance within 15 calendar days after receipt of the Company's prehearing brief.

All pre-hearing briefs filed with the impartial umpire shall fully disclose the material facts and arguments which are to be presented to him by the parties for his consideration. The decision of the impartial umpire will be restricted to whether the violation of the Agreement alleged in the pre-hearing brief exists and, if a violation is found, to specify the remedy in accordance with the terms of the Agreement.

(c) *Wage Inequity Claims:* Except as in this Agreement otherwise expressly provided, any grievance which shall involve any claim that any then existing wage rate should be changed shall not be submitted to arbitration under the provisions of this Section, unless the Company and the Union shall specifically agree in writing so to submit such grievance or unless such claim is that such wage rate was established or increased or decreased in contravention of the provisions of this Agreement.

(d) *Umpire's Authority:* An impartial umpire to whom any grievance shall be submitted in accordance with the provisions of this Section shall, in so far as shall be necessary to the determination of such grievance, have authority to interpret and apply the provisions of this Agreement, but he shall not have authority to alter in any way any of such provisions. The impartial umpire shall also have similar authority with respect to the Insurance Agreement between the parties (including

the Program of Insurance Benefits (PIB)) and shall be limited to the application of the terms of the Insurance Agreement (including PIB) to the extent necessary to determine the disposition of grievances properly arising under Article XXI of this Agreement.

(e) *Decisions—Final and Binding:* The appointment of such impartial umpire as hereinbefore provided and his decision on any matter which shall properly have been referred to him shall be final and binding upon the Company, the Union and all Employees concerned therein.

(f) *Umpire's Compensation:* The compensation of such impartial umpire for his services hereunder and his expenses in connection therewith shall be shared equally by the Company and the Union.

(g) *Period Covered by Awards:* Except as in this Agreement otherwise expressly provided, an award of the impartial umpire in respect of any grievance which shall be so submitted to him shall not in any case be made retroactive to a date prior to the date on which the initial complaint shall have been first discussed in the procedure set forth in Section 2 of this Article. An award of the impartial umpire in respect to any grievance in respect of rates of pay (other than a grievance arising out of the provisions of Article V of this Agreement), overtime compensation, call-in pay, shift premiums, suspensions, seniority, holidays and vacations shall be made retroactive to the date of the occurrence or non-occurrence of the event upon which the grievance is based, but in no case prior to a date 30 calendar days before the complaint shall have been initially presented in such procedure.

Section 4. Union Complaint and Grievance Procedure

(a) *Plant Grievance Committee:* There shall be one Grievance Committee at each Plant, which shall consist of such number of Employees as shall be mutually agreed upon between the Management's Representative and the

Union, but the number thereof shall not in any case be less than 3 nor more than 10.

(b) In each Local Union at the Plant the number of Assistant Grievance Committeemen shall be not more than one per 60 Employees.

(c) *Time Off For Assistant Grievance Committeeman:* If any Assistant Grievance Committeeman of the Union shall so request of his foreman, he shall be granted such time off without pay as he may reasonably require for the purpose of investigating the facts with regard to and of endeavoring to settle any complaint in Step No. 1 or Step No. 2 in his department and for the purpose of attending Step No. 2 discussions concerning complaints which he has processed in Step No. 1.

(d) *Discipline—Right to Representation:* Any Employee who is summoned to meet in an enclosed office with a supervisor for the purpose of discussing possible disciplinary action shall be entitled to be accompanied by the Assistant Grievance Committeeman designated for the area if he requests such representation, provided such representative is available during the shift.

(e) *Time Off For Grievance Committeeman:* If any member of the Grievance Committee shall so request of his foreman, he shall be granted such time off without pay as he may reasonably require for the purpose of investigating and of endeavoring to settle any complaint in Step No. 2 or grievance in Step No. 3 with which he shall be concerned and, by request to the Management's Representative, he shall be permitted to visit any department other than his own, when a visit there is necessary for such purposes.

(f) *Union Plant Visits:* If a representative of the Union who shall have been certified to the Company in writing as the Union's representative for the purpose of handling grievances in Step No. 4 from a particular Plant shall so request of the Management's Representa-

tive, he shall be permitted to visit such Plant for the purpose of investigating any grievance which shall have been appealed therefrom to Step No. 4, subject to such regulations as shall be established by the Management's Representative.

(g) *Group Complaints:* In the case of a complaint involving a large group of Employees, a representative number may participate in the oral discussion in Step No. 1 and Step No. 2 of the procedure.

Section 5. Employee Discipline Records

(a) *Time Limits on Use:* The Company in arbitration proceedings will not make use of any personnel records of previous disciplinary action against the Employee involved where the disciplinary action occurred 5 or more years prior to the date of the event which is the subject of such arbitration.

(b) Written records of disciplinary action against the Employee involved for the violation of a safety rule but not involving a penalty of time off will not be used by the Company in any arbitration proceeding where such action occurred one or more years prior to the date of the event which is the subject of such arbitration.

Section 6. Company Obligations to Union

Grievances Alleging Violations: The complaint and grievance procedure may be utilized by the Union in processing grievances which allege a violation of the obligations of the Company to the Union as such. In processing such grievances, the Union shall observe the specified time limits in appealing and the Company shall observe the specified time limits answering. In the event an Employee dies, the Union may process, on behalf of his survivors, any claim he would have had to any monies due under any provision of this Agreement.

Section 7. Initiating Complaints or Filing Grievances

Referral to Proper Step: Complaints or grievances which are not presented initially in the proper Step of the complaint and grievance procedure shall be referred to the proper Step for discussion and answer by the Company and Union representatives designated to handle complaints or grievances in such Step.

Section 8. Grievance Under Prior Agreement

Applicable Contract: Any complaint or grievance which was presented under a prior agreement between the Company and the Union and which is still pending and not finally disposed of by August 1, 1974, shall be determined in accordance with the applicable provisions of such prior agreement which were in effect at the time when such grievance arose.

Section 9. Grievance Procedure—Proper Functioning

Committee for Review: If at any time during the term of this Agreement it is agreed by the International Union and the Company that the complaint and grievance procedure at a Plant is functioning in such a manner as to be unsatisfactory in giving prompt attention to complaints and grievances or that a problem requiring special attention has developed in the functioning of the arbitration procedure, a committee shall be established consisting of an agreed-upon number of persons from each party for the purpose of reviewing the functioning of the complaint and grievance procedure in question or the arbitration procedure problem. The committee so established shall be authorized to make such recommendations as it deems proper with respect to the matter to the Chairman of the Bethlehem Union Negotiating Committee and the Manager of Labor Relations. Such committee shall be discontinued after it has completed its review and report.

Section 10. Exception to Normal Filing Procedure

Chairman of Grievance Committee Initiates: The Chairman of the Union's Plant Grievance Committee may file grievances in writing directly into Step No. 3, if he believes this to be necessary, concerning alleged violations of Article II, Sections 1(d) and 3, and Article V, Sections 2 and 3, in conformity with the provisions of Article XI except that the signature of affected Employees shall not be required.

Exhibit 2—Grievance 74-08206

BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES

APPEAL FORM

Name of Employee: Donald J. Flowers	Clock Number: 342-68	Department: 342
Type of Complaint: Contracting out	Date of Incident: Past 30 days	
Date of Written Complaint: 5/15/75	Date of Foreman's Oral Response: 5/15/75	Date Settled:	Date Withdrawn:
Foreman's Signature: Joseph F Cipressi	Date Received by Assistant Grievance Committeeman: 5/5/75	
Signature of Affected Employee(s): D. C. F Flowers	Assistant Grievance Committeeman's Signature: D. C. F Flowers	
	Date of Appeal to Step No. 2: 5/5/75	
	Step No. 2 Disposition: Denied	Date Mailed: 8/13/75
The settlement of a complaint in Step No. 1 or Step No. 2 shall be without prejudice to the position of either party.	Safety Committeeman's Signature: J. Hilburn	
	Grievance Committeeman's Signature: A. Mauti 8-13-75	

Canary—Assistant Grievance Committeeman's Copies (2)
Canary—Grievance Committeeman's Copies (2)

Pink—Superintendent's Copy
Green—Foreman's Copy

GRV

This is another in what appears to be a never-ending string of complaints on the same subject. The grievant has *never* done all the welding in the Garage (342), and never could. As necessary, we have regularly obtained help from various mechanical shops in the Plant (structural, plate, machine, pipe shops, for example) and we intend to continue the practice. In the meantime, it is apparently the desire of the grievant to negotiate some kind of essential, irreplacable status for himself, perhaps to minimize the possibility of lay-off. We do not consider such desires to be properly included in the grievance procedure.

Signature of Superintendent

/s/ [Illegible]

Date—8/19/75

Date of Appeal by Grievance Committeeman to Management's Representative

8/21/75

Date of Event	*Employee*
Past 30 days	342-68 D. Flowers

DISPUTED FACTS

(Superintendent and Grievance Committeeman)

Whether or not the Agreement has been violated.

UNITED STEELWORKERS OF AMERICA
LOCAL UNION NO. 2602

GRIEVANCE RECORD

D. Flowers, 342-68

STATEMENT OF GRIEVANCE
(Grievance Committeeman)

This grievance is being submitted to protest the Company assignment of 342 Welder work to the 461 Department that has historically and exclusively been performed by the 342 welder. A list of dates and jobs was presented at Step #2 on 7/11/75 for review and resolution of the problem. In addition, the method of pay calculation has been subject of dispute time and time again. There should be one standard established for like and similar work.

Deny This

DENIED
DECS 10 P
2609

REMEDY SOUGHT
(Grievance Committeeman)

The Union contends that the 342 welder work should be returned and the grievant should be made whole for all monies lost.

CONTRACTUAL RELIANCE
(Grievance Committeeman)

The Union claims violation of Article II, Section 1(d), 3, Article V, X, XI and XIII of the Main Agreement.

/s/ A. Marotto
8-13-75

Date of Meeting
9-25-75

Grievance Record
No. 74-08206

ADDITIONS

STEP NO. 3 MEETING

Local No. 2602

(Flowers—461 doing 342 work)

ATTENDANCE
Garage

Sep. 26 1975

FOR THE UNION	FOR THE MANAGEMENT
A. Marotto	R. R. Walther
C. Walters	

ADDITIONAL FACTS NOT AVAILABLE TO THE STEP NO. 2 PARTICIPANTS:

UNION POSITION:

MANAGEMENT POSITION:

The Union and Management mutually agreed to remand Grievance No. 74-08206 to Step No. 2 of the Grievance Procedure for the purpose of providing the Union with dates when this type or similar types of work has been performed by the Mechanical Department Shops, prior to the date of the aggrieved incident.

For the Union

/s/ A. Marotto Date of Signature—9-26-75

For the Management

/s/ R. R. Walters Date of Signature—9-26-75

Exhibit 3—Grievance 74-08213

Dan - Pat - J Bowles	3-12-69	34.2
Violation of J.C.B.A. Art. 8 H.S. 4 (H)	Date of Event 5/15/75	
Date of Initial Discussion 5/15/75	Date of Appeal to Step No. 1 5-15-75	Date Denied
Joseph Cipriani		Date Received by Union and Grievance Committeeman 5/15/75
Department or Agencies Involved D. C. F. Bowles		Union and Grievance Committeeman's Decision D C F Bowles
		Date of Appeal to Step No. 2 5/15/75
		Step No. 1 Disposition Denied — Date Mailed 7/11/75
The settlement of a complaint in Step No. 1 or Step No. 2 shall be without prejudice to the position of either party.		Superintendent's Signature J M Sinnamon
		Grievance Committeeman's Signature J Morretta 7-11-75

Canary—Assistant Grievance Committeeman's Copies (2)
Canary—Grievance Committeeman's Copies (2)
Pink—Superintendent's Copy
Green—Foreman's Copy

5

Date of Event	*Employee*
Various	342-68 D. Flowers

DISPUTED FACTS

(Superintendent and Grievance Committeeman)

Whether or not the Agreement has been violated.

UNITED STEELWORKERS OF AMERICA
LOCAL UNION NO. 2602

GRIEVANCE RECORD

D. Flowers—342-68

STATEMENT OF GRIEVANCE
(Grievance Committeeman)

This grievance is being written to protest the M.E.M. personnel doing welding in the 342 Department. They are causing an unsafe practice since they were not tested on their welding qualifications and are not qualified welders. Some dates that the incident occurred are—April 14 & 15, 1975—body and fender—rebuilt rear end of water flusher (welded angles & brackets on bumper). April 13, 1975, 3 to 11 turn, truck #27—MEM welded lower tail gate hooks and side of dump body, also welded angles inside body. They finished on 3 to 11 turn Wed. 4-23-75.

H/A w/74-08206)
08512) Step 4
10215)

REMEDY SOUGHT
(Grievance Committeeman)

The Union demands that this work be returned to the qualified welder and the grievant should be made whole for all monies lost.

CONTRACTUAL RELIANCE
(Grievance Committeeman)

Violation of Article II, sec. 1(d), 3, Articles V, X, XI, XIII & XIV of Main Agreement.

SIGNATURE OF GRIEVANCE COMMITTEEMAN

/s/ A. Marotto—7-11-75

The grievant would be hard-pressed to prove that our mobile equipment mechanics are categorically "not qualified welders." Furthermore, there would seem to be some risk that any standards he proposed might be applied to his own work. Our mechanics have traditionally done welding from time to time, and regardless of the persistent, defensive haranguing of the grievant, it is our intention to *continue* having welding work done by mechanics (as noted before, welding *is* part of the job description for mobile equipment mechanics.)

Signature of Superintendent

/s/ [Illegible] Date—7/21/75

Date of Appeal by Grievance Committeeman
to Management's Representative 7-21-75
JM

Date of Meeting
8-8-75

Grievance Record
No. 74-08213

ADDITIONS
STEP NO. 3 MEETING
Local No. 2602

(Flowers—MEM doing welding)

ATTENDANCE

Garage

Aug. 13, 1975

FOR THE UNION	FOR THE MANAGEMENT
A. Marotto	A. H. Hein
C. Walters	R.R. Walther
I. Tricoli	

ADDITIONAL FACTS NOT AVAILABLE TO THE STEP NO. 2 PARTICIPANTS:

UNION POSITION:

The Union stated that its position is adequately set forth in the Grievance Record with the addition of the following statements:

The Union stated that the amount of welding being performed by the Mobile Equipment Mechanics and the Body and Fender Man is excessive and is creating a safety hazard. The Mobile Equipment Mechanics and Body and Fender Men are not qualified Welders. Furthermore they are taking work away from the Welder who is qualified to do that type of work.

MANAGEMENT POSITION:

The Management stated that its position is adequately set forth in the Grievance Record with the addition of the following statements:

The Management vehemently denies that the Mobile Equipment Mechanics and Body and Fender Men are creating a safety hazard by performing welding duties. The Mobile Equipment Mechanic and Body and Fender Men are qualified welders and are working well within the scope of their respective job descriptions.

The "Tools and Equipment for the Body and Fender Man is as follows:

> *Burning and welding torch*, welding machine, electric, hydraulic, and pneumatic powered hand tools, undercoating equipment, degreaser, steam cleaner, paint spray gun, oxygen and acetylene cylinders, measuring devices, tire tools, maul, hammers, wrenches, hoses, chisels, pliers.

The "Tools and Equipment" for the Mobile Equipment Mechanic is as follows:

> Various sizes and kinds of powered and hand tools, such as torque wrenches, grinders; micrometers, calipers, gauges, jacking and hoisting devices, socket wrenches, screw drivers, hammers; testing equipment, wheel balancing and alignment machines, *welding and burning equipment*, cylinder boring machine, drawings, equipment manuals, etc.

The "Working Procedure" for the Body and Fender Man is as follows:

> "Operates burning and welding torches, and welding machine to burn, weld, braze, and lead fill miscellaneous parts such as chassis, bodies and fenders." "Lays out, cuts to size, assembles and installs items such as truck bodies, cabs, benches, tailgates, safety shields, truck sides, brackets, tool boxes, control panels, using measuring devices, hand and powered tools, burning and welding equipment."

The "Working Procedure" for the Mobile Equipment Mechanic is as follows:

Repairs and rebuilds bodies and frames, etc., by straightening, welding, brazing, refinishing and painting.

It is very obvious that welding is an integral part of the job description of the Mobile Equipment Mechanic and the Body and Fender Man. Grievance No. 74-08213 is denied.

For the Union

/s/ A. Marotto Date of Signature—8-12-75

For the Management

/s/ A. Hein Date of Signature—8-12-75

Step No. 4 Meeting
January 14, 1976
Discharging Plant (2602)

Grievance Record No. 74-08213

Grievant:

D. Flowers, a Welder in the Garage Department.

Nature of Grievance:

A protest against Mobile Equipment Mechanic personnel in the Garage Department doing welding work. A further protest against employees assigned to the position of Body and Fender Man doing welding work.

The Company and the Union stated that their contentions with respect to this grievance are adequately and accurately set forth in the Grievance Record.

Disposition: The grievance was denied.

Exhibit 4—Grievance 74-08512

NAME OF EMPLOYEE: DON FLOWERS
CLOCK NUMBER: 342-68
LOCATION: 342
NATURE OF COMPLAINT: STRUCTURAL REP. & GARAGE MOBILE EQUIP MECHS. DOING WELDING
DATE & TIME: 9/29 TO SEPT 29, 1975
DATE OF INITIAL COMPLAINT: SEPT. 14, 1975
DATE OF FOREMAN'S ORAL RESPONSE: SEPT. 29, 1975
DATE APPEALED:
DATE WITHDRAWN:
EMPLOYEE'S SIGNATURE: Earl J Connors
DATE RECEIVED BY ASSISTANT GRIEVANCE COMMITTEEMAN: 9/29/75
SIGNATURE OF ASSISTANT GRIEVANCE COMMITTEEMAN'S DESIGNEE: D. C. F Lowe
DATE OF APPEAL TO STEP NO. 2: 9/29/75
D. C. F Lowe
DISPOSITION: Denied
DATE RENDERED: 12-3-75

1. The settlement of a complaint in Step No. 1 or Step No. 2 shall be without prejudice to the position of either party.

SIGNATURE OF GRIEVANCE COMMITTEEMAN'S DESIGNEE: G. Marotto 12-3-75

2 Canary—Assistant Grievance Committeeman's Copies (2)
Canary—Grievance Committeeman's Copies (2)
Pink—Superintendent's Copy
Green—Foreman's Copy

UNITED STEELWORKERS OF AMERICA
LOCAL UNION NO. 2602

GRIEVANCE RECORD

D. Flowers—342-68 & Others A.F.72

STATEMENT OF GRIEVANCE
(Grievance Committeeman)

On 11-20-75, the Union met with the Superintendent to discuss the grievant's complaint. The Superintendent had assumed that the complaint in question was the same as a previous complaint and had not been given any reports from his Foreman. The Union points out the fact that it is this lack of concern and investigation that has created many of the problems in the grievance procedure. The grievant presented a writeup which is to be made part of this grievance record and in addition offered the circumstances that existed under Grievance II 4454 (AGC-3233) and its resolution. The Union pointed out the importance of having each employee perform within their own classification such as welders doing welding work and Body & Fender men doing body and fender work, etc. The expertise in their workmanship give quality performance and improves the maintenance program.

REMEDY SOUGHT
(Grievance Committeeman)

The Union contends that the grievant and others should be recalled to their respective positions and all affected employees should be made whole for all monies lost.

CONTRACTUAL RELIANCE
(Grievance Committeeman)

Violation of Art. II, sec. 1(d), 3, 4, Articles V, X, XI, XIII & Appendix 16 of Main Agreement.

Signature of Grievance Committeeman

/s/ A. Marotto—12-3-75

Date of Event	*Employee*
8/29 to 9/29/75	342-68 D. Flowers

DISPUTED FACTS

(Superintendent and Grievance Committeeman)

Whether or not the Agreement has been violated.

SUPERINTENDENT'S RESPONSE AND DETAILED REASONS THEREFOR

Despite the "statement of grievance", this is the same basic issue raised many times by the grievant: D. Flowers feels he has the exclusive right to do welding at the garage, and the management does not agree. At this time, the grievant is on lay-off, making the issue more acute from his point of view, but it *is* still the same issue. The management insists on its historic right to have mobile equipment mechanics do some welding (after all, it is part of their job description), and also to call upon the Mechanical Department shops from time to time to supplement our own forces. It must be remembered that the welding capability at the garage was developed primarily to handle bulldozer repairs, and since this function was returned to the Locomotive Repair Shop in 1971, our needs for a full-time welder are considerably diminished. Under present levels of business, we do not need a full-time welder at all.

Signature of Superintendent

/s/ [Illegible] Date—12/9/75

Date of Appeal by Grievance Committeeman to Management Representative 12/9/75—JM

74-102 15

NAME OF EMPLOYEE: D. Flowers | CHECK NUMBER: 342-68 | DEPARTMENT: 342

TYPE OF COMPLAINT: SAFETY - MECH. CLOCK WELLERS | DATE OF EVENT: 12-8-75

DATE OF WRITTEN COMPLAINT: 12-8-75 | DATE OF FOREMAN'S ORAL RESPONSE: 12-8-75 | DATE SETTLED | DATE WITHDRAWN

FOREMAN'S SIGNATURE: Ed Farmer | DATE RECEIVED BY ASSISTANT GRIEVANCE COMMITTEEMAN'S SIGNATURE: 12-15-75

SIGNATURE OF AFFECTED EMPLOYEE(S): D Flowers | DATE OF APPEAL TO STEP NO. 2: 12/15/75

STEP NO. 2 DISPOSITION: denied | DATE MAILED: 2/13/76

SUPERINTENDENT'S SIGNATURE: M Farmer

GRIEVANCE COMMITTEEMAN'S SIGNATURE: G. Martin 2-13-76

The settlement of a complaint in Step No. 1 or Step No. 2 shall be without prejudice to the position of either party.

Canary—Assistant Grievance Committeeman's Copy (2) | Pink—Superintendent's Copy
Canary—Grievance Committeeman's Copy (1) | Green—Foreman's Copy

BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES

99

APPEAL FORM 44151 (Rev.8 10-73)

74-102 15

NAME OF EMPLOYEE: D. FLOWERS | CHECK NUMBER: 342-68 | DEPARTMENT: 342

TYPE OF COMPLAINT: CLAIMS UNJUST LAYOFF | DATE OF EVENT: 11/8/1975

DATE OF WRITTEN COMPLAINT: 1/7/76 | DATE OF FOREMAN'S ORAL RESPONSE: 1/7/76 | DATE SETTLED | DATE WITHDRAWN

FOREMAN'S SIGNATURE: Earl Connors | DATE RECEIVED BY ASSISTANT GRIEVANCE COMMITTEEMAN: 1/7/76

SIGNATURE OF AFFECTED EMPLOYEE(S): D Flowers | DATE OF APPEAL TO STEP NO. 2: 1-7-76

STEP NO. 2 DISPOSITION: denied | DATE MAILED: 2/13/76

SUPERINTENDENT'S SIGNATURE: J. Williams

GRIEVANCE COMMITTEEMAN'S SIGNATURE: G. Martin 2-13-76

The settlement of a complaint in Step No. 1 or Step No. 2 shall be without prejudice to the position of either party.

Canary—Assistant Grievance Committeeman's Copy (2) | Pink—Superintendent's Copy
Canary—Grievance Committeeman's Copy (1) | Green—Foreman's Copy

Exhibit 5—Grievance 74-10215

74 10215

D. Flowers — 342-68 — 342

Unjust Lay off

11/7/75 — 11/7/75 — 11/21/75

J. F. Cipriani

D. C. Flowers

11/14/75

D. C. Flowers

11-14-75

Denied — 2/13/76

A. Martin 2-13-76

The settlement of a complaint in Step No. 1 or Step No. 2 shall be without prejudice to the position of either party.

Canary—Assistant Grievance Committeeman's Copies (2)
Canary—Grievance Committeeman's Copies (2)
Pink—Superintendent's Copy
Green—Foreman's Copy

Went to Local Step 2

BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES

APPEAL FORM 74-10215

91

D. FLOWERS — 342-68 — 342

UNJUST LAY OFF

12-8-75 — 12-8-75

12-8-75

E. Glenn - Ovt.

D. FLOWERS

12/5/75

12/5/75

2/13/76

A. Martin 2-13-76

The settlement of a complaint in Step No. 1 or Step No. 2 shall be without prejudice to the position of either party.

Canary—Assistant Grievance Committeeman's Copies (2)
Canary—Grievance Committeeman's Copies (2)
Pink—Superintendent's Copy
Green—Foreman's Copy

Lackawanna, N.Y., Plant

UNITED STEELWORKERS OF AMERICA
LOCAL UNION NO. 2602

GRIEVANCE RECORD

D. Flowers—#342-68

STATEMENT OF GRIEVANCE
(Grievance Committeeman)

This grievance contains the issues under four appeal forms—#81, 91, 93 and 99 on a continuing basis and involves the layoff of the grievant and the use of other employees to perform his work, creating a hazardous and unsafe condition. The Step 2 discussions on 1-28-76, 1-29-76 and the investigation of the incentive contract are all to be considered part of this record. The Union illustrated during the course of these meetings and investigation, that in addition to the incentive contracts, there are witnesses from the 461 department that can testify and verify they are performing the welder work normally performed by the 342 welder. The Union had great difficulty in developing this record and did not appreciate the frustrations heap upon them in the development of the record. It is incredible that Supervisory have taken the position that although there are separate job classifications for Welder and M.E.M. that for a period in excess of two months or more, there was no requirement for the welder work when repairs are being made on a daily basis. In addition to the welding work that has been recorded on incentive contracts, there is additional welding categorized as day work, that is not recorded but being performed on a daily basis. The Union presented only a portion of the incentive contracts to the Superintendent because of the limited time it was afforded. The Union has also cautioned the Company

of contacting the O.S.H.A. agency and have them investigate the safety aspects of this garage operation.

Meeting held on 2-13-76 also to become part of this record.

REMEDY SOUGHT
(Grievance Committeeman)

The Union demands the immediate recall of the grievant and he should be made whole for all monies lost and the Company should cease and desist the combination of job assignments.

CONTRACTUAL RELIANCE
(Grievance Committeeman)

Violation of Article II, sec. 1(d), 3, Articles V, X, XI, XIII, XIV & Appendix 16 of Main Agreement.

Signature of Grievance Committeeman

/s/ A. Marotto—2-13-76

Date of Event	*Employee*
11/7 & 8/75 12/8/75	342-68 D. Flowers

DISPUTED FACTS

(Superintendent and Grievance Committeeman)

Whether or not the Agreement has been violated.

SUPERINTENDENT'S RESPONSE AND DETAILED REASONS THEREFOR

The garage has always used the services of various mechanical shops from time to time for welding (and other) work. Furthermore, mobile equipment mechanics have always performed some welding work in the course of their normal duties. In view of these continuing sources for welding work, and at present reduced levels of operation, there is no compelling reason to keep a "junior" welding specialist on the payroll while allowing "senior" employees to go on lay-off. Consequently, the welder was placed on lay-off when his turn came in the normal force-reduction sequence. In its unusually strong presentation on behalf of the grievant, the union seems almost to be disregarding the interests of its "senior" members. Indeed, with specific threats to contact O.S.H.A., and implied threats expressed in the step 2 meeting (it was suggested that the Corporation will not respond until faced with a "resolution"), one might well speculate as to just which interests *are* represented by the union.

Signature of Superintendent

/s/ [Illegible] Date—2/18/76

Date of Appeal by Grievance Committeeman to Management's Representative 2/19/76—JM

Exhibit 6—Minutes of Step 3 and Step 4 Meetings

Date of Meeting	Grievance Record
10-18-76	Nos. 74-08206, 74-08512 & 74-10215

ADDITIONS

STEP NO. 3 MEETING

Local No. 2602

ATTENDANCE

Garage Department

FOR THE UNION	FOR THE MANAGEMENT
T. Ott	J. J. McMahon
K. Blersch	R. R. Walther
D. Flowers	

ADDITIONAL FACTS NOT AVAILABLE TO THE STEP NO. 2 PARTICIPANTS:

Inasmuch as the above grievances concern the same issue, the Local Union and Management agreed to discuss these cases together.

UNION POSITION:

1. Management has violated the provisions of Article II, Article V, Article X, Article XI, Article XIII and Article XIV by allowing welding work to be performed in the Garage Department by employees other than the grievant.

2. The grievant was on layoff during the period 11-8-75 through 4-11-76. The grievant is a craft Welder and during the period of layoff, employees from the 461 Department and non-craft employees from the Garage Department performed the grievant's normal welding duties.

3. The welding work performed by non-craft employees is not of the same quality as the grievant's work. This shoddy welding may well present a hazardous condition.

4. The grievant, while at work, is paid on a secondary-indirect incentive rate of pay. Welders from the 461 Department are paid a direct incentive. The grievant, when at work, is entitled to a direct incentive payment.

5. The work in question is not of an emergency situation. Therefore it should have been performed by a Welder from the Garage Department on a regularly scheduled basis.

6. It is improper to bring Welders from another seniority unit into the Garage Department to perform welding duties while the Welder from the Garage is laid off.

7. The work performed by the Structural Repair Shop was in connection with 44" Mill butt boxes. This is a primary duty for the Garage Department Welder.

MANAGEMENT POSITION:

1. Throughout the history of the Garage Department, the Structural Repair Shop has done work for the Garage Department. During the period of 4-25-75 through 5-9-75, the Structural Repair Shop spent a total of 164 hours repairing 44" Mill Butt boxes.

2. The Job Descriptions of the Garage Department's Mobile Equipment Mechanics and Body and Fender Man both provide that these employees are required to weld.

3. Grievance No. II-4454 protested the fact that the Mobile Equipment Mechanic, Body and Fender Man and employees from the Structural Repair Shop performed the dates of the grievant while the grievant was on layoff in late 1971 and early 1972. Grievance No. II-4454 was withdrawn at Step No. 4 on 5-3-72.

4. Grievance No. 74-07672 protested the fact that the grievant was only scheduled to work four days in the week of 11-24-74 and Structural Repair Shop employees were utilized to weld 44" Mill butt boxes. Grievance No. 74-07672 was withdrawn at a Pre Arbitration Meeting on 5-10-76.

5. Management cited Arbitration Decision No. 2446, dated 6-11-76, Lackawanna Plant and Decision No. 1230, dated 1-13-66, Lackawanna Plant.

6. The grievant, while at work, is properly paid at a secondary indirect incentive.

7. The welding work performed by the Mobile Equipment Mechanic and Body and Fender Men meets all repair standards.

Management stated that based on the above facts, the request contained in Grievance Nos. 74-08206, 74-08512 and 74-10215 are denied.

For the Union

/s/ K. Blersch
/s/ T. E. Ott—A35 Date of Signature—10/18/76

For the Management

/s/ J. J. McMahon Date of Signature—10-18-76

Lackawanna Plant (2602)
Step No. 4 Meeting
December 8-9, 1976

Grievance Records Nos. 74-08206, 74-08512, and 74-10215

Grievant:

D. Flowers, 342-68, a Welder assigned to the Garage Department.

Nature of Grievance:

The Union contends that Management violated Article II, Sections 1(d) and 3; Article V; Article X; Article XI; Article XIII; Article XIV and Appendix 16, of the Agreement when it assigned the grievant's welding work to other Garage Department employees and employees of the Structural Repair Shop.

The Union stated that its contentions with respect to this grievance are, in substance, adequately and accurately set forth in the Grievance Record.

The Company stated that its contentions with respect to this grievance are, in substance, as set forth in the Grievance Record, with the following additions:

Additional Company Contentions:

It is Management's prerogative, pursuant to Article XIII, of the Agreement, to assign the work. The welding work in the Garage Department has been assigned to various employees over the years. There is ample evidence of Garage Department welding work which has been assigned to the Structural Repair Shop. The Job Descriptions for the jobs of Mobile Equipment Mechanic (Plant Code 60-5118) and Body and Fender Man (Plant Code 60-5113) clearly contemplate that employees assigned to those jobs will perform welding work.

These grievances constitute an improper attempt, in violation of Article II, Section 3(a) of the Agreement, to establish a practice where none exists. The Union has not proven nor can it prove that a practice exists which gives the grievant exclusive rights to Garage Department welding work. The Union's obligation in this regard is clearly established by *Decision No. 1609, Seward/Porter, Lackawanna Plant, December 10, 1962.*

There has not been any violation of Article II, Sections 1(d) and 3; Article V; Article X; Article XI; Article XIII; Article XIV and Appendix 16, of the Agreement.

Disposition: The grievances are denied.

[LOGO]

BETHLEHEM STEEL

FILE REF. 10/7/76

FROM E. J. Connors

TO H. D. Evenden

SUBJECT Scheduling Procedures & Bidding Practices In The Garage Dept.

In response to your letter of 9/27/76, concerning Grievance No. 74-07197 (R.C. Cordero, 342-386), the following procedures are used in the Garage Dept. We have 5 units.

1—Driving unit

2—Servicemen (tire men & greasers)

3—Body repair

4—Welder

5—Mobile equipment mechanic (repair shop)

R.C. Cordero transferred from the 530 dept. to the garage on 6/9/70 on a requisition dated 5/18/70, copy attached. The requisition clearly states to be used as serviceman.

On 6/17/75, I spoke to Gus Hein in regards to Cordero bidding on driving jobs that were posted for the driving unit. On 6/19/75 I was told that as long as there were men on lay-off in the driving unit Cordero would have to continue as a serviceman until all drivers on lay-off were recalled. Cordero then could be slotted in the driving unit when an opening arose. Note attached copies regarding same.

Bidding procedures—When we have a permanent vacancy in the driving unit it is posted for 30 days. The most senior man that bids the job is then awarded the bid by his plant seniority.

Temporary bids are posted in the driving unit when the driver that holds the job on permanent bid is on regular vacation, EV or S.I.P. This posting is posted for 14 days and the most senior man in the driving unit is awarded the bid by his plant seniority.

We post a 2 week vacation bid for 14 days on a temporary bid and the senior man is awarded this bid the same way.

We do not post a one week vacation bid but we do post it daily on the bid board.

R. C. Cordero was advised that he could not be assigned to the driving unit until all drivers were recalled from lay-off and an opening was available. He still put his bid in for the tab mail driving job.

Appeal form #90 dated 11/21/75 is also in the procedure and appealed directly to Step #3, Grievance #74-22193.

/s/ Earl J. Connors
General Foreman
Plant Services

CC: J.J. McMahon
J.G. Streamer
File

Exhibit 7—Arbitrator's Decision

OFFICE OF THE IMPARTIAL UMPIRE
DECISION NO. 2609

February 24, 1978

In the Matter of the Arbitration between—

BETHLEHEM STEEL CORPORATION

and

UNITED STEELWORKERS OF AMERICA,
LOCAL UNION NO. 2602

Grievances Nos. 74-08206,
74-08213, 74-08512 and
74-10215

Lackawanna Plant

Chronology

	Grievances Nos.			
	74-08206	74-08213	74-08512	74-10215
Submitted in Step No. 1	5/15/75	5/15/75	9/14/75	11/7/75
Appealed to Step No. 2	5/15/75	5/15/75	9/29/75	1/7/76
Discussed in Step No. 2	8/13/75	7/11/75	12/3/75	2/13/76
Appealed to Step No. 3	8/19/75	7/21/75	12/9/75	2/18/76
Discussed in Step No. 3	9/25/76 10/18/76	8/8/75	9/25/76 10/18/76	9/25/76 10/18/76
Appealed to Step No. 4	10/26/76	8/14/75	10/26/76	10/26/76
Discussed in Step No. 4	12/8/76	1/14/76	18/8/76	12/8/76
Appealed to Arbitration	2/18/77	2/26/76	2/18/77	2/18/77
Arbitration Hearing	9/8/77	9/8/77	9/8/77	9/8/77
Transcript Received	11/17/77	11/17/77	11/17/77	11/17/77

Lackawanna Plant
Local Union No. 2602
Grievances Nos. 74-08206, 74-08213, 74-08512 and 74-10215

Decision No. 2609
February 24, 1978

These grievances, in essence, protest the Company's method of assigning the welding work in the 342 Garage Department during a period from approximately November, 1975, to April, 1976, in which the regularly-scheduled craft welder, the grievant, Donald Flowers, an Assistant Grievance Committeeman for the Union, was laid off. The grievances allege violations of Articles II, Sections 1(d) and 3, V, X, XI, XIII, and XIV of the Agreement. The Company, at the Umpire hearing, raised an additional issue under Article XI, Section 2, as to whether the grievant alone would be entitled to a remedy, were the grievance to be sustained, since he was the only individual to have signed the grievance as an "affected" employee under that provision.

The essential facts, except as noted below, are not in dispute, and may be stated as follows. The grievant became a Craft Welder in the 342 Garage Department in 1962. As a Craft Welder, the grievant performed laying out, burning, fitting, brazing, and finish welding with both arc and acetylene welding equipment, on whatever mobile equipment, such as trucks, cars, etc., was brought to the Garage to be repaired or rebuilt. The other employees in the Garage who performed various aspects of the repair or rebuilding of this mobile equipment were either Mobile Equipment Mechanics (MEM) or Body and Fender Men. Although the grievant, as a Craft Welder, was assigned to do most of the welding in the Garage on his turn before he was laid off, the Job Descriptions for the MEM's and the Body and Fender Men set forth that these positions were also to perform welding as part of their other duties. There is no dispute that these individuals performed some welding work even while the

Craft Welder was present. Most of the welding performed by the MEM's and Body and Fender Men was described generally as "tack" welding, i.e., a simple welding procedure, intended only to hold the equipment together until a complete welding job could be performed. The Craft Welder, in addition to his own separate assigned "contracts", would also be assigned to assist the other employees in the Garage on the more complicated welding procedures. Even during the period prior to his layoff, the welding by the Craft Welder was supplemented in the following ways: some of the welding was sent to the Structural Repair Shop, due to a lack of certain welding equipment in the Garage; on occasion, Craft Welders from Structural Repair would be assigned to weld in the Garage; and, certain mobile equipment was sent to outside concerns for repair, usually in circumstances where such mobile equipment had been involved in an accident and the insurance company had requested that the repairs be done by the manufacturer. (The Umpire was advised by the Union that there are additional grievances pending which protest various incidents of such "supplemental" welding.)

The grievant was laid off in November, 1975, during a period in which the Company was experiencing adverse business conditions. Due to the lower volume of production throughout the Plant at the time, the Company was able to take out of service, or "mothball", equipment which required extensive repairs. Consequently, the Company determined that it could maintain operations in the Garage without the services of the Craft Welder; the grievant, as well as some MEM's and Body and Fender Men, therefore, were laid off. A second welder on another turn, a minority employee, was also laid off at this time, so that there were no Craft Welders assigned in the Garage during this period. (The Union advised that there was a complaint pending before the Implementation Committee under the Consent Decree concerning the Company's removal of this Craft Welder).

The Union contended in its pre-hearing brief, and at the Umpire hearing, that the Company had removed the Craft Welders from the Garage as a subterfuge to abolish the Craft Welder position in the Garage. The Umpire finds it unnecessary to determine whether, in fact, the Company ever entertained such a plan, since, in any event, the grievant was subsequently recalled to work as a Craft Welder, making the Union's contention moot. Further, there was no evidence presented to establish that the Company discriminated against the grievant under Article II, Section 1(d) when it laid him off.

The Umpire also finds no violation presented under Article II, Section 3, or the rules relevant to Craft jobs insofar as the Company assigned MEM's in the Garage to perform welding during the period of the grievant's layoff. The Union has not shown an "invasion" of the craft by the work performed by the MEM's, i.e., there is no showing that the MEM's performed "craft welding" which, therefore, was different from the type of welding MEM's had performed when the grievant was present in the Garage. There was no specific evidence to rebut the Company's assertion that equipment requiring extensive "craft welding" was either "mothballed", or repaired by a Craft Welder from Structural Repair, either in that shop or in the Garage. Further, in light of the practice of MEM's doing some welding in the Garage while the Welder was present, and no showing that they did any "craft" type welding during the period of his layoff, there is no violation of any practice under Article II, Section 3, of the Craft Welder in the Garage performing *all* welding. Compare Decision No. 1953, 34 IUD 355, dated December 3, 1971 (Porter/Seward), discussing therein Decision No. 1584, 31 HUD 29, dated October 4, 1968 (Seward). There is also no evidence, in any event, that there was a sufficient amount of welding work performed by MEM's in the Garage to have war-

ranted the recall of the grievant from layoff. Nor was there sufficient welding work to have warranted the Company's retaining the grievant, either in addition to, or instead of one of the MEM's retained, all of whom had greater seniority than the grievant.

Nor has the Union proved that the Company violated Article I, Section 3, by its assignments, during this period, of "craft welding" work to Craft Welders from Structural Repairs, either in that shop or in the Garage. Here there can be no contention of an "invasion" of the Welding Craft, since the employees assigned were Craft Welders. Further, there is no evidence as to the amount of time spent by the Craft Welders from Structural Repair on mobile equipment in the Garage; a Company witness asserted that, because of "mothballing", the total was less than the supplemental welding performed prior to the Craft Welder's layoff. The Umpire concludes that, at most, the Union has shown that there was *some* welding work performed in the Garage, by MEM's or by Structural Repair Welders, which the grievant could have, and, in all likelihood, would have performed had he not been laid off. The Union has not shown that there was a sufficient amount of "craft" welding work to warrant the Company's recalling the grievant from layoff and, perhaps, laying off an MEM in his place.

The Umpire finds no violation of Articles V, X, XI, or XIII have been presented, and these allegations are rejected. As to the allegation that the Company's assignment of welding to the MEM's violated Article XIV, the Union has failed to demonstrate that the MEM's are unqualified to do *any* welding in a safe manner, or that the mobile equipment so repaired would be unsafe to put back in service for that reason.

In light of the above disposition, the Umpire considers it unnecessary to decide the issue concerning "affected employees" under Article XI, Section 2.

DECISION

The grievances are denied.

APPROVED:

/s/ Seymour Strongin
SEYMOUR STRONGIN
Impartial Umpire

/s/ Joseph M. Sharnoff
JOSEPH M. SHARNOFF
Associate Umpire

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ. 79-40

DONALD C. FLOWERS
78 Wiesner Road
Lackawanna, NY

—and—

KING E. JONES
96 Alexander Place,

Plaintiffs

v.

LOCAL 2602, UNITED STEELWORKERS OF AMERICA, and UNITED STEELWORKERS OF AMERICA INTERNATIONAL, and BETHELHEM STEEL CORPORATION,

Defendants

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT

SIRS:

PLEASE TAKE NOTICE, that the Bethlehem Steel Corporation, by its attorneys Donald S. Bauman, H. Dawson Penniman and H. Kenneth Schroeder, Jr., Hodgson, Russ, Andrews, Woods & Goodyear, will move this Court at a term thereof to be held at the United States Courthouse in the City of Buffalo, New York, at Part II of said Court, on the 23rd day of April, 1979, at 9:00 o'clock in the forenoon of that date or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12(b)(6) dismissing the Complaint in this action as to Defendant, Bethlehem Steel Corporation, on the grounds that the complaint fails to state a claim upon which re-

lief can be granted in that the events set forth in the complaint upon which the claims therein are based arose more than ninety (90) days prior to the filing of the complaint and, therefore, such claims are barred by the applicable Statute of Limitations set forth in Section 7511(a) of the New York Civil Practice Law and Rules.

This motion is made upon the attached memorandum and exhibits and the complaint in the case.

DATED: Buffalo, New York,

/s/ Donald S. Bauman
DONALD S. BAUMAN
Bethlehem, PA 18016

/s/ H. Dawson Penniman
H. DAWSON PENNIMAN
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HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

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The Memorandum of Decision of the District Court is printed as Appendix E of the Petition, Pet. App. 12a-15a.

The Judgment of the District Court is printed as Appendix F of the Petition, Pet. App. 16a.

The *Per Curiam* Judgment of the Court of Appeals on the first appeal is printed as Apepndix D of the Petition, Pet. App. 10a-11a.

The Order of the Supreme Court on the first petition is printed as Appendix C of the Petition, Pet. App. 9a.

The Opinion of the Court of Appeals on the Second Appeal is printed as Appendix A of the Petition, Pet. App. 1a-7a.

The Judgment of the Court of Appeals on the Second Appeal is printed as Appendix B of the Petition, Pet. App. 8a.

October 25, 1982

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Alexander L. Stevas
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Supreme Court of the United States
Washington D.C. 20543

Re: United Steelworkers of America
AFL-CIO-CLC et al v. Donald C. Flowers
and King E. Jones
No. 81-2408

Daar Mr. Stevas:

On August 11,1982, I received a letter from Eugene Salisbury stating as follows:" I had Don Flowers in my office to-day to discuss your matter with the United Steelworkers and Bethlehem Steel Company. The United Steelworkers have applied for certiorari for hearing in the United States Supreme Court. There is a good likelihood that certiorari will be granted. In that regard, a number of other unions, whom we do represent have been asked to file amicus curiae briefs. Because of that turn of events, it is no longer possible for us to continue as counsel in this matter. The ethical considerations for attorneys prevent us from being involved in a case where we have clients on both sides. Accordingly, this letter advises you that we are withdrawing as counsel, based upon ethical considerations."

As of this date, October 25, 1982, I am unable to obtain counsel to respond to the Supreme Court's petition for a writ of certiorari filed by the United Steelworkers and Local 2602, the same as Mr. Flowers.

Sincerely, King Jones

P.S. This letter is in response to the letter I received dated October 15, 1982 from Francis J. Lorson, Chief Deputy Clerk, Supreme Court.

King Jones

Office-Supreme Court, U.S.
FILED
MAR 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-2408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

v.

DONALD C. FLOWERS and KING E. JONES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the six-month limitations period contained in § 10(b) of the National Labor Relations Act determines the timeliness of a suit alleging that a union has breached the duty of fair representation created by that Act?

2. If not, whether in a hybrid § 301 breach-of-duty of fair representation action brought against an employer and union, the state statute of limitations governing actions to vacate arbitration awards, which *United Parcel Service v. Mitchell*, 451 U.S. 56, "borrowed" to determine the timeliness of the claim against the employer, also determines the timeliness of the claim against the union?

LIST OF PARTIES

In addition to the parties listed in the caption, the Bethlehem Steel Corporation was a defendant in the district court and an appellee in the court of appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2408

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

DONALD C. FLOWERS and KING E. JONES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF PETITIONERS

This brief is the joint product of petitioners—United Steelworkers of America, AFL-CIO-CLC ("USWA") and Local 2602 of the USWA—and the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the federation of national and international unions with which the USWA is affiliated. The decision of petitioners and the AFL-CIO to file a single brief reflects the identity of their views on the legal issues presented, and their desire to minimize the burden on the Court by stating their common position only once.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York is not officially reported and is reprinted at Pet. App. 12a-15a. The judgment of

the District Court is reprinted at Pet. App. 16a. The *per curiam* judgment of the United States Court of Appeals for the Second Circuit on the first appeal is unreported and is reprinted at Pet. App. 10a-11a. The order granting the first petition for certiorari, vacating the judgment of the court of appeals, and remanding the case for reconsideration in light of this Court's decision in *United Parcel Service v. Mitchell*, 451 U.S. 56, is reported at 451 U.S. 965, and is reprinted at Pet. App. 9a. The opinion of the court of appeals on remand is reported at 671 F.2d 87 and is reprinted at Pet. App. 1a-7a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was issued on February 1, 1982 (App. B). On April 21, 1982, Justice Marshall signed an order extending the time for filing a petition for a writ of certiorari to and including June 2, 1982 (App. G), and on May 20, 1982, Justice Marshall signed an order further extending the time for filing a petition to and including July 1, 1982 (App. H). The petition was filed on July 1, 1982, and a writ of certiorari was granted on November 29, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reprinted as an Appendix to this Brief.

STATEMENT OF THE CASE[1]

Respondents at all times relevant herein were employed by Bethlehem Steel Corporation (hereinafter "the Company"), and represented for collective bargaining purposes by petitioners United Steelworkers of America,

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[1] The case is here from the district court's granting of a motion to dismiss, and the court of appeals' reversal of that dismissal. Accordingly, the "facts" recited herein are those alleged in the complaint, which for present purposes must be assumed to be true.

AFL-CIO-CLC, and its Local Union 2602 (hereinafter collectively referred to as the "Union"). The Union and the Company were parties to a collective bargaining agreement which contained, *inter alia*, a grievance and arbitration procedure for resolving differences "as to the meaning and application of the provisions of this Agreement" (JA 14). The agreement empowered the Union to submit to arbitration grievances that could not be resolved between the parties in the four-step grievance procedure established by the agreement (*Id.* 24). The agreement further provided that the arbitrator's resolution of a grievance "shall be final and binding upon the Company, the Union, and all Employees concerned therein" (*Id.* 27).

Respondents, who were craft welders in the Company's "342 Garage Department," filed several grievances in 1975 and 1976 claiming that the Company had violated the collective bargaining agreement by assigning certain welding duties to employees in other job categories and to employees in other departments of the plant, rather than assigning those duties to a craft welder in the garage. At the time these assignments were made, respondents were on layoff or were assigned to non-craft work; respondents contended in their grievance that under the collective bargaining agreement the Company was required to recall respondents to their craft welding jobs to do the work in question. The grievances sought backpay for the work opportunities that respondents had lost (JA 32-54).

The Union processed the grievances through all steps of the grievance procedure. Throughout that process the Company insisted that the collective bargaining agreement permitted the job assignments which the Company admitted had been made. After exhausting the grievance process the Union invoked arbitration. On February 24, 1978, following an evidentiary hearing, the arbitrator issued an award holding that the Company had not vio-

lated the agreement by its method of assigning welding work (JA 62-68).

The complaint in this action was filed by respondents on January 9, 1979, eleven months after the arbitrator issued the award. The Company and the Union were both named as defendants. The complaint alleged that, contrary to the arbitrator's decision, the Company had violated the collective bargaining agreement by assigning welding work to others while respondents were laid off or assigned to other work (JA 7). The complaint further alleged that the Union's "preparation, investigation and handling of [respondents' grievances in arbitration] was so inept and careless as to be arbitrary and capricious, denying the [respondents] a fair hearing on their grievances" and thus constituting a violation of the Union's "duty to fairly represent [respondents] under section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a)" (JA 10). The complaint prayed "for all damages suffered by [respondents] as a result of the Employer's breach of the collective bargaining agreement and the [Union's] breach of their duty of fair representation," the damages to be "[a]pportion[ed]" among the defendants "as the Court deems just."

The Union and Company each moved to dismiss the complaint on the ground that the suit was time-barred (JA 12, 68). The district court granted the motions to dismiss, holding that New York's 90-day statute of limitations for actions to vacate arbitration awards was applicable to suits, like the instant one, against an employer and a union in which the underlying grievance had been submitted to arbitration (Pet. App. 14a). Respondents appealed to the United States Court of Appeals for the Second Circuit which reversed, concluding that actions of this type were governed by New York's six-year limitations period for actions for breach of contract (Pet. App. 10a).[2]

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[2] The court of appeals first set forth this conclusion in *Mitchell v. United Parcel Service, Inc.*, 624 F.2d 394 (1980), *rev'd*, 451 U.S. 56

The Union petitioned this Court for a writ of certiorari seeking review of the Second Circuit's decision. The Court granted the petition, vacated the judgment, and remanded the case for "further consideration in light of *United Parcel Service v. Mitchell*, [451 U.S. 56 (1981)]" which the Court had decided while the petition for certiorari in the instant case was pending (Pet. App. 9a).

On remand, a two-judge panel of the court of appeals affirmed the district court's judgment of dismissal in part and reversed that judgment in part. The court of appeals held that under *Mitchell* the arbitration statute of limitations was applicable to the claim against the Company, and that therefore that claim had been properly dismissed (Pet. App. 2a). But the appellate court concluded that *Mitchell* was not controlling on the limitations period for the claim against the Union (Pet. App. 5a). Treating that issue as one of first impression, the court rejected the Union's argument that the six-month limitations period of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) or, alternatively, the arbitration statute of limitation which had been applied to the claim against the Company, applied to respondents' claim against the Union (Pet. App. 5a-7a). Instead, the court of appeals held that New York's "three-year nonmedical malpractice statute of limitations applies to the employees' action against the union for breach of its duty of fair representation" (Pet. App. 6a-7a).

This Court issued a writ of certiorari to review this decision by the Second Circuit.

(1981), which was decided by the Second Circuit while the instant case was pending before that court. After it issued its decision in *Mitchell*, the court of appeals reversed the district court judgment in the instant case on the basis of that decision.

SUMMARY OF ARGUMENT

I. The first question presented here was expressly left open by this Court in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981): absent an express statute of limitations for the judicial cause of action for breach of the duty of fair representation, should § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), be applied to determine the timeliness of such actions or, instead, should state statutes of limitations be applied for that purpose. Because the duty of fair representation is a statutory duty, the limitations question here is one of discerning the intent of Congress.

Where Congress has expressly created a cause of action at law without expressly stating a time limit for that action, it is generally to be presumed that a time limit was intended, and, in the normal case, the most likely, if not the only, source for such a limit that Congress could have intended is a state statute of limitations for analogous actions. "But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). And in this context—in which Congress did not expressly create or even consider either the fair representation duty or the fair representation cause of action—Congress' failure to specify a time limit cannot be seen as any indication of Congress' intent with respect to the limit for that action.

Congress has not left the Court without guidance, however, as to the limitations period that should be applied to fair representation actions. The duty of fair representation is an integral part of the complex of employee, employer and union rights that together comprise the national labor policy established by Congress. That policy seeks to achieve industrial peace by means of a process of continuous collective bargaining, beginning with the formation of a collective agreement and continuing with

a grievance procedure for resolving disputes under that agreement; through these processes the "law of the shop" is to be established. Although serving important goals in the collective bargaining system, duty of fair representation claims—whether aimed at the union's conduct in negotiating the collective agreement or in resolving disputes under it—call into question those consensual processes and the law of the shop established through them.

In enacting § 10(b) Congress made a determination, albeit in the unfair labor practice context, as to the limitations period that best accommodates the sometimes conflicting values embodied in the national labor policy. Specifically, Congress chose a six month limitations period so as to protect the "stability of bargaining relationships." *Machinists Local v. Labor Board*, 362 U.S. 411, 425 (1960). The same values are at stake in establishing a time limit for the judicial fair representation action. Indeed, as Justice Stewart stated in his concurring opinion in *Mitchell*, § 10(b) applies, in terms, to "claims of a very similar character" to fair representation claims, 451 U.S. at 68 n.3—in particular, to unfair labor practice claims under §§ 8(b)(1)(A) & (b)(2) which impose on unions at least some, and perhaps all, of the obligations encompassed by the duty of fair representation. Thus, as Justice Stewart stated, § 10(b) represents a "clear congressional indication of the proper balance between the interests at stake." 451 U.S. at 70-71.

Application of state limitations periods, rather than § 10(b), would produce two anomalous results. First, unless § 10(b) is applied to judicial fair representation claims, the limitations period for such claims would vary depending on the forum chosen or, perhaps, depending on the specific type of fair representation violation alleged. And second, unless § 10(b) is applicable, the period of time during which collective bargaining agreements, or grievance resolutions under such agreements, would be subject to challenge would vary from state to

state; indeed the very same agreement or grievance resolution could be vulnerable in one state and not in another.

For all these reasons, § 10(b) provides the appropriate source for determining the timeliness of fair representation claims.

II. If the Court were to conclude, contrary to our showing in Part I, that state statutes of limitations, rather than § 10(b), apply to judicial fair representation claims, the Court would then have to determine which state limitations period is applicable. This is a "hybrid § 301 breach-of-duty action" in which it is alleged that the employer breached its collective bargaining agreement and that the union breached its duty of fair representation in prosecuting plaintiffs' grievance over the employer's asserted contractual breach. In such cases, the claim against the union necessarily challenges the validity of the resolution of the grievance reached through the grievance arbitration process. This is true for two reasons.

First, this Court recently ruled that in cases of this type the union may be held liable for a portion of the plaintiff's back wages. Such liability necessarily depends on a finding, in the case against the union, that a breach of contract occurred, and thus that the decision arrived at through the grievance-arbitration process—here the decision of the arbitrator—was incorrect. Second, in any event, proof that the union breached its duty of fair representation necessarily establishes that the grievance process malfunctioned. Such proof, perforce, drains all precedential force from the grievance resolution and thereby defeats a critical function of labor arbitration: to develop the law of the shop.

This Court's holding in both *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and *Mitchell* rest on the recognition that an allegation that the union breached its fair representation duty necessarily entails a challenge to the arbitration process. In *Hines* the Court held

that "if it seriously undermines the integrity of the arbitral process the union's breach [of its fair representation duty] removes the bar of the finality provisions of the contract," 424 U.S. at 567, thereby enabling the plaintiff to challenge the employer's asserted breach of contract. And in *Mitchell* it was the alleged unfair representation by the union that led the Court to analogize the "hybrid" claim against the employer to an action to vacate an arbitration award; the employer secured the benefit of the arbitration limitations period (even though the employer's alleged misdeed was a breach of contract) because proof of a breach of the union's duty was necessary to establish the employer's liability. But given this reasoning—and given that the elements of the claims against the employer and Union are identical—it would be anomalous not to give a union the benefit of the same limitations period where, as here, the cause of action is against the union itself for its asserted breach of duty.

ARGUMENT

I. SECTION 10(b) OF THE NATIONAL LABOR RELATIONS ACT IS THE SOURCE FOR DETERMINING THE TIMELINESS OF A SUIT ALLEGING THAT A UNION HAS BREACHED ITS DUTY OF FAIR REPRESENTATION CREATED BY THAT ACT.

The first question presented here was expressly left open by this Court in *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n.2 (1981): since the judicial cause of action for breach of the duty of fair representation is not subject in terms to a statute of limitations, should § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) ("NLRA" or "the Act"), be applied to determine the timeliness of such actions or, instead, should state statutes of limitations by applied for that purpose.

The *Mitchell* Court concluded that the question should not be decided in that case because it had been raised only by an *amicus curiae* and not "by either of the parties

here or below." *Id.* Only Justice Stewart would have decided the § 10(b) issue in *Mitchell*, and he would have held that "§ 10(b) is . . . the proper source for determining when claims of breach of duty must be raised." *Id.* at 68 n.3.[3]

Here, the question whether § 10(b) should apply was expressly decided by the court below, and that question is expressly raised in this Court, Pet. p. i. As we proceed to show, Justice Stewart's answer in *Mitchell* is the correct one: § 10(b) is the proper source for determining the limitations period for fair representation causes of actions.

The duty that the Union is alleged to have breached here—the duty of fair representation—is a "statutory duty," *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Thus, the asserted liability of the Union is "entirely a creature of [a] federal statute." *Northwest Airlines, Inc. v. Transit Workers Union*, 451 U.S. 77, 97 (1981). Because it is "the exclusive province of the Congress . . . to

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[3] Justice Blackmun stated in a concurring opinion in *Mitchell* that "I find much that is persuasive in Justice Stewart's analysis," but he agreed with the majority that resolution of the issue "should await the development of a full adversarial record." 451 U.S. at 65. Justice Stevens, in a dissenting opinion, while agreeing that it was "not appropriate" to decide the § 10(b) issue in *Mitchell*, *id.* at 75, nonetheless expressed disagreement with Justice Stewart's analysis, *id.* at 75-76. We address Justice Stevens' disagreement *infra* at 22-24.

In the wake of *Mitchell*, two courts of appeals have concluded that § 10(b) determines the limitations period for fair representation causes of action, at least where a state statute of limitation for actions to vacate arbitration awards is not applicable. *Hall v. Printing and Graphics Arts Union*, No. 82-1109 (7th Cir., Dec. 21, 1982); *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982). *See also* Grenig, *The Statute of Limitations in Fair Representation Cases*, 33 Lab. L.J. 483, 487 (1982). The Fifth Circuit, as well as the court below, has reached a contrary conclusion. *Edwards v. Sea-Land Service, Inc.*, 678 F.2d 1276 (5th Cir. 1982). The district courts likewise have reached conflicting conclusions. *See* Pet. p. 9 & n.3.

formulate legislative policies," *TVA v. Hill*, 437 U.S. 153, 194 (1978), the office of the judicial branch in the context of a statutory action is a limited one: "[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end," *id.*

Nowhere is this more true than with respect to statutes of limitations. For the "length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson v. Railway Express Agency*, 421 U.S. 454, 463-64 (1975). There is no sure calculus for making that value judgment and for fixing the balancing point; "any statute of limitations is necessarily arbitrary," *id.* Thus, the informed and flexible judgment of the legislative branch is particularly suited to the inherently discretionary process of setting limitations periods, and in this context it is especially important for the judicial branch to limit its role to "discern[ing] the meaning of [the] enactment." To state that task here, however, is far simpler than to perform it.

"When Congress has created a cause of action and has not specified the period of time within which it may be asserted, the Court has frequently inferred that Congress intended that a local limitation should apply." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). In essence, at least since *Campbell v. City of Haverhill*, 155 U.S. 610, 616, (1895), this Court has reasoned that where Congress has expressly created a cause of action at law without expressly stating a time limit for that action, it is generally to be presumed that a time limit was intended, and, in the normal case, that the most likely, if not the only, source for such a limit that Congress could

have intended is a state statute of limitations for analogous actions.[4]

"But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute." *Occidental Life Ins. Co. v. EEOC*, *supra*, 432 U.S. at 367. And if reason rather than rote is the guide, the peculiar origins of the fair representation cause of action make it the last one in which to draw the inference that Congress' failure to enact a limitations period shows a congressional intent

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[4] This reasoning was the basis on which the Court, in *Auto Workers v. Hoosier Corp.*, 383 U.S. 696 (1966), concluded that state limitations periods apply to actions between employers and unions, under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, for breach of collective bargaining agreements. The Court in *Hoosier*, after reviewing its usual practice of borrowing a state limitations period, concluded that "[a]gainst this background, we cannot take the omission [of a limitations period] in the present statute as a license to judicially devise a uniform time limitation for § 301 suits." *Id.* at 704. (The dissenters in *Hoosier* concluded that state law was not applicable because they found "no sound basis for saying that Congress by its silence on the limitations matter intended the state laws to apply . . . The courts *are* expected to develop the law of labor contracts, and this case represents only another task in this process." *Id.* at 710 (emphasis in original) (White, J., joined by Douglas and Brennan, JJ., dissenting).)

As Justice Stewart, the author of the Court's opinion in *Hoosier*, observed in his *Mitchell* concurring opinion, 451 U.S. at 65-67, *Hoosier* is not controlling on the limitations period for a fair representation cause of action (or for a § 301 action against an employer by an employee seeking to vindicate a claim of breach of the collective bargaining agreement which claim was rejected in the grievance-arbitration machinery established by the collective bargaining agreement). For *Hoosier's* holding favoring state limitations laws governs § 301 claims—and not fair representation claims—and, moreover, those § 301 cases presenting "the kind of contract dispute . . . [which does] not implicate 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.'" *Mitchell*, *supra*, 451 U.S. at 66 (Stewart, J., concurring), *quoting Hoosier*, *supra*, 383 U.S. at 702. *See also* pp. 16-17, *infra*.

that a state limitations period be applied. The fair representation *duty* was not expressly created by Congress but rather is one which this Court has found to be "implicit in the National Labor Relations Act." *Electrical Workers v. Foust*, 442 U.S. 42, 46-47 n.8 (1978). Furthermore, the *cause of action* for breach of that duty likewise has been "judicially 'implied from the statute,'" *Id.* at 47, *quoting Steele v. L. N.R. Co.*, 323 U.S. 192, 204 (1944).[5] And we have found no discussion whatever in the legislative history of the Wagner Act or the Labor Management Relations Act of 1947 ("LMRA") with respect to whether a fair representation duty existed under the NLRA, with respect to whether such a duty should be created, or *a fortiori* with respect to whether to create a judicial cause of action for breach of that duty.

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[5] While the Court has long and consistently recognized that the duty of fair representation is a statutory duty implied from the NLRA, the Court has been less clear as to whether, as *Foust* states, the cause of action for breach of that duty is an implied cause of action (with jurisdiction predicated on 28 U.S.C. §§ 1331 & 1337, the jurisdictional predicate relied on in *Tunstall v. Brotherhood*, 323 U.S. 210 (1944), for the fair representation cause of action implied under the Railway Labor Act) or whether it is an express cause of action under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. *Compare, e.g., Syres v. Oil Workers*, 350 U.S. 892 (1955) (relying on *Tunstall* to sustain jurisdiction for a judicial fair representation action under the NLRA) *with Humphrey v. Moore*, 375 U.S. 335 (1964).

That *Foust* properly resolves this issue is apparent from the following considerations. Section 301 creates a cause of action for breaches of those duties that are imposed by contract, and not by operation of law. The duty of fair representation, however, is a statutory—rather than a contractual—duty (p. 10, *supra*). Indeed, in some fair representation cases, such as *Steele v. L. & N.R. Co.*, 323 U.S. 192 (1944) or *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), the object of the suit is to have the court *invalidate* provisions of a collectively-negotiated contract—provisions with which the parties to the contract have been complying; plainly such actions cannot be deemed to arise under § 301. And while in other fair representation cases, such as the instant case, plaintiffs' attack is on the manner in which the union has prosecuted a grievance

Congress therefore has not considered any of the questions concerning the nature of the fair representation duty or the judicial cause of action to enforce the duty. Congress' "failure" to specify a time limit cannot, accordingly, be seen as any indication of Congress' intent with respect to the time limit for that action. As Justice Stewart stated in his concurring opinion in *Mitchell*, 451 U.S. at 68 n.4:

> [T]he fact that Congress did not provide a limitations period for a judicially enforceable action later found implied in the NLRA is not comparable to a congressional failure to establish a time limitation for an action it expressly creates by statute. . . . [I]t cannot reasonably be assumed here that congressional silence reflects an intent to apply state statutes of limitation for an action based in part on rights and obligations traceable to the NLRA.[6]

Thus, the ordinary primary guides to the "meaning of the enactment" (*see* p. 11, *supra*) are not available here. Congress has not specifically addressed the issue of the appropriate time limit for the judicial cause of action

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under the contract—and while such a claim may, as here, be coupled with a § 301 claim against the employer for an alleged breach of contract—the source of the cause of action against the *union* remains the same: an implied action under the NLRA.

Even if, *arguendo*, a fair representation claim were cognizable under § 301, it would still be true that such a claim is not the type of claim that Congress contemplated in enacting that section. Thus, even on that assumption, Congress' failure to prescribe a limitations period for § 301 actions generally could not be taken as indicating an intent to apply local limitations periods to actions of this type. And *Hoosier* expressly leaves open the possibility of applying a uniform federal limitations period for some types of § 301 actions. 383 U.S. at 705 n.7.

[6] *See also* Note, *Limitation Borrowing in Federal Courts*, 77 Mich. L. Rev. 1127, 1133 (1979) (in implied causes of action "one cannot infer . . . an intent to conform to the historical practice of borrowing limitations from state law; in these cases Congress has had no opportunity to consider enacting its own explicit limitation period").

for breach of the duty of fair representation, and the normal rule the Court has evolved for interpreting Congress' failure to specify a limitations period does not make sense in this context. But Congress has not left the Court without guidance as to the limitations period that should be applied to fair representation actions. For as we now show, the duty of fair representation is an integral part of the complex of employee, employer, and union rights that together comprise the national labor policy established by Congress; Congress, in enacting § 10 (b), has made a determination as to the limitations period that best accommodates the sometimes conflicting values embodied in that policy; and the same values are at stake in establishing a time limit for the judicial fair representation action.

1. (a) It is well-settled that all the interests here are component parts of the collective bargaining system established by the NLRA. The fair representation duty has been implied from those provisions of the NLRA that establish the "principle of majority rule"—a principle that is "[c]entral to the policy of fostering collective bargaining," *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 62 (1975).[7] The duty stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the[se] provisions of federal labor law." *Vaca v. Sipes, supra*, 386 U.S. at 182.

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[7] As the Court has explained, it is

> Because '[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit,' [that] the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, 'the responsibility and duty of fair representation.'" [*Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976); (citations omitted)]

At the same time it cannot be gainsaid that the pendency, or potential pendency, of duty of fair representation claims "threatens the smooth functioning of those consensual processes the federal labor law is chiefly designed to promote." *Hoosier, supra*, 383 U.S. at 702. The NLRA seeks to foster a "continuous collective bargaining process, " *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 578 (1960), through which is established "the law of the shop." *United Parcel Service v. Mitchell, supra*, 451 U.S. at 64. That process "is the keystone of the federal scheme to promote industrial peace." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

The collective bargaining process begins with the formation of a collective agreement. Congress' "manifest objective in providing for collective bargaining" was to facilitate "the making of contracts with labor organizations" since "the fundamental purpose of the Act [which] is to protect . . . commerce from interruptions and obstructions caused by industrial strife . . . appears to be served by these contracts in an important degree." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 236-37 (1938). And after the contract is made, the collective bargaining process continues in a grievance procedure for resolving disputes under the contract, and thereby further develop the law of the shop. As the Court recently stated:

> Fundamental to federal labor policy is the grievance procedure. It promotes the goal of industrial peace by providing a means for labor and management to settle disputes through negotiation rather than industrial strife. Adoption of a grievance procedure provides the parties with a means of giving content to the collective bargaining agreement and determining their rights and obligations under it. [*Bowen v. Postal Service*, —— U.S. ——, slip op. at 12 (January 11, 1983); (citations omitted)] [8]

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[8] *See also United Parcel Service v. Mitchell, supra*, 451 U.S. at 63-64; *Truck Drivers Union v. Riss & Co.*, 372 U.S. 517 (1963); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964).

In every suit alleging a breach of the fair representation duty, the plaintiff challenges the union's conduct either in "its negotiation of a collective bargaining agreement [or] in its handling of the grievance machinery." *Vaca v. Sipes*, *supra*, 386 U.S. at 181. In the former type of case, if the plaintiff proves that the union acted out of an improper purpose in negotiating the agreement, the result will be to overturn the agreement in whole or in part. *E.g.*, *Steele v. L. & N.R. Co.*, *supra*. In the latter type of cases, if the plaintiff establishes that the union acted improperly in prosecuting a grievance, the plaintiff will, perforce, have established that the "grievance procedure . . . malfunction[ed]," *Bowen v. Postal Service*, *supra*, slip op. at 10; *see Hines v. Anchor Motor Freight Inc.*, *supra*, 424 U.S. at 568, 570, 572. Having established such a malfunction, the resolution of the grievance—whether arrived at through arbitration or through an agreement by the parties—can no longer be accepted as giving meaning and content to the collective bargaining agreement (*see* p. 16, *supra*), and the parties to the agreement can no longer conduct themselves in reliance upon that resolution as the law of the shop. *See also* pp. 26-28, *infra*.[9] Thus, fair representation actions necessarily implicate the functioning of the "consensual processes" that the NLRA seeks to promote.

(b) Section 10(b) of the NLRA states Congress' judgment, albeit in the unfair labor practice content, as to the length of time that decisions arrived at through these

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[9] The instant case well illustrates the point. The arbitrator here decided a controversy concerning the Company's rights, under the collective agreement, in assigning work; his decision established a rule concerning work assignments which, presumably, the parties have been following. But if plaintiffs were able to prove, as they have alleged, that the Union's "preparation, investigation and handling of [respondents' grievances] was so inept and careless as to be arbitrary and capricious, denying the [respondents] a fair hearing on their grievance" (p. 4, *supra*), the correctness of the arbitrator's decision necessarily would be called into question, and the law of the shop would become uncertain.

consensual processes should be open to attack. That provision was fashioned by Congress as part of the federal labor laws to take into account the unique interests involved in this unique statutory context. In enacting § 10 (b), Congress determined that "the 'relatively rapid disposition of labor disputes' " should be "one of the leading federal policies in this area." *Mitchell, supra*, 451 U.S. at 63; *Clayton v. Auto Workers*, 451 U.S. 679, 693 (1981). Congress chose a six month time limit in § 10(b), as this Court has explained, in order to protect the "stability of bargaining relationships," *Machinists Local v. Labor Board*, 362 U.S. 411, 425 (1960); *see id.* at 419. Section 10(b) thus represents the balance that Congress, "[a]s expositor of the national interest," struck between the interests of employees in "vindicat[ing their] statutory rights" and the "interests in 'industrial peace which it is the overall purpose of the Act to secure,' " *id.* at 429-30. And as Justice Stewart observed in *Mitchell*, "[t]hat is precisely the balance at issue" in the fair representation context, 451 U.S. at 70.[10]

Indeed, in enacting the § 10(b) limitations period in the LRMA Congress made that limitations period applicable, in terms, to "claims of a very similar or identical character" to claims that later have come to be entertained under the fair representation rubric, as Justice Stewart also observed in *Mitchell*, 451 U.S. at 68 n.3. Specifically, in the LMRA Congress imposed certain express duties upon unions running to the employees the unions represent or seek to represent and Congress subjected actions for breaches of those duties to the § 10(b) limitations period.

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[10] In *Machinists Local*, the charge by the employees ran against the formation of the agreement; the employees alleged that the union had not represented a majority of the bargaining unit when the agreement was signed. Fair representation suits, as noted may challenge either the formation of the agreement or its administration (p. 17, *supra*), but both are parts of the collective bargaining system established by the Act (p. 16, *supra*).

Of particular relevance here are § 8(b)(1)(A), which makes it an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in section 7," including the § 7 right to "refrain from" concerted activities; and § 8(b)(2), which makes it unlawful for unions "to cause or attempt to cause an employer to discriminate against an employee" based on union membership or based upon an effort to encourage or discourage union membership. Under those two sections at least some breaches of the duty of fair representation—those in which the union's conduct rests on consideration of union membership or non-membership[11]—unquestionably constitute unfair labor practices as well. Indeed, in enacting §§ 8(b)(1)(A) & (b)(2), Congress proscribed the very conduct in which the union had engaged in *Steele* and in *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944), the pre-LMRA decisions of this Court touching on the duty of fair representation.[12]

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[11] As the Court explained in *Radio Officers v. Labor Board*, 347 U.S. 17, 40 (1954), § 8(b)(2) is "designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union"; thus, if a union discriminates against an employee in providing representation because the employee has chosen to "abstain from joining" the union or to be a "bad or indifferent member" of the union, § 8(b)(2), as well as the duty of fair representation, is violated.

[12] In *Steele*, the black plaintiffs could not become—and thus were not—members of the union and the contract provisions that were challenged "restricted [plaintiffs'] employment for the benefit and advantage of the Brotherhood's own members." 323 U.S. at 198.

In *Wallace Corp.*, an independent union with which the employer had a collective agreement had refused to admit "CIO men" to membership as a result of which the employer, pursuant to the union security provision of the agreement, discharged the "CIO men" as non-members of the independent union. The Court in *Wallace Corp.* held that in so doing the employer had violated § 8(3)—now § 8(a)(3)—of the Act, and was not privileged to do so by virtue of the union security agreement. The Court stated:

> The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the inter-

Subsequent to the enactment of the LMRA, the Labor Board,[13] with the approval of most of the courts of appeals,[14] has held that *all* breaches of the duty of fair representation violate §§ 8(b)(1)(A) or (b)(2). This Court has twice declined to decide whether the Board and the lower courts are correct in that position, *Vaca v. Sipes, supra*, 386 U.S. at 386; *Humphrey v. Moore, supra*, 375 U.S. at 344. That question thus remains an open one in this Court.

Regardless of how that issue ultimately is resolved, however, this much is clear: § 10(b) applies, in terms, to at least some unfair representation claims when those claims are brought before the NLRB. Section 10(b) also applies to other claims that are related to fair representation claims in that they involve interests of employees similar to the interests that are asserted in fair representation suits. *E.g., Machinists Local v. Labor Board,*

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ests of its own group members. By its selection as a bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. * * * We do not construe the provision [in § 8(3)] authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the act to protect for all workers. It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone. [323 U.S. at 255-256]

The legislative history of § 8(b)(2) makes clear that one of the principal evils to which that section was addressed was conduct of the type in which the union had engaged in *Wallace Corp.* See 2 Leg. History of the LMRA at 1010, 1096, 1420.

[13] *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enf. denied*, 326 F.2d 172 (2nd Cir. 1963).

[14] *See* cases cited in Justice Stewart's concurring opinion in *Mitchell*, 451 U.S. at 67-68 n.3.

supra. Thus, § 10(b)—unlike any state limitations period that might be borrowed in its stead—was fashioned by Congress to take into account the special considerations that are implicated here in the same way as in claims to which the provision expressly applies. As Justice Stewart put it, § 10(b) represents a "clear congressional indication of the proper balance between the interests at stake," 451 U.S. at 70-71.

(c) Finally, application of state limitations periods, rather than § 10(b) would lead to two anomalous results —results that Congress could not have intended or desired. First, unless § 10(b) is applied to judicial fair representation claims, the limitations period for such claims would vary depending on the forum chosen (i.e., the NLRB or the courts) or, perhaps, depending on the specific type of fair representation violation alleged. The result would be to favor one forum over another or certain types of fair representation claims over other types for reasons that would be wholly arbitrary.

Second, unless § 10(b) is applicable, the period of time during which collective bargaining agreements, or grievance resolutions under such agreements, would be subject to challenge would vary from state to state; indeed, the very same agreement or grievance resolution could be vulnerable in one state and not in another. This Court has held that "[t]he need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it." *Hoosier*, *supra*, 383 U.S. at 702. Failure to apply § 10(b) to fair representation claims would deny uniformity precisely where "the need for uniformity . . . is greatest." *See also Chevron Oil Co. v. Huston*, 404 U.S. 97, 104 (1971).

For all the foregoing reasons, § 10(b) is the proper source for determining the timeliness of fair representation claims.

2. In reaching its contrary conclusion, the court below (*see* Pet. App. at 5a-6a) relied exclusively on Justice Stevens' concurring and dissenting opinion in *Mitchell*. In that opinion, Justice Stevens, while agreeing with the majority that the applicability of § 10(b) to fair representation claims was not properly presented (pp. 9-10, *supra*), criticized the suggestion that § 10(b) be applied to such claims as "strained." 451 U.S. at 75. Noting that by its terms "[t]he plain language of [§ 10(b)] indicates that it is directed solely to the administrative procedure established by Congress . . . for the resolution of unfair labor practice charges," Justice Stevens reasoned that "[n]othing in the statutory language suggests that Congress intended that this 6-month limitations period be applied" to fair representation claims brought to the judiciary. *Id.* at 76 n.8. Indeed, to Justice Stevens it followed that Congress could not have so intended, since "this Court had not yet divined" the fair representation action" when § 10(b) was enacted." *Id.* at 75-76.

We agree, of course, that in enacting § 10(b), Congress did not—indeed could not—have had it in mind that that limitations period would apply to judicial fair representation actions because such causes of action had not yet been "divined" by this Court.[15] But is is *equally* true that

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[15] In 1947, when the § 10(b) limitations period was enacted as part of the LMRA amendments to the Wagner Act, the fair representation cause of action had been implied only under the Railway Labor Act, *Steele v. L. & N.R. Co.*, *supra*; *Tunstall v. Brotherhood*, *supra*, and not under the NLRA. And as Justice Powell explained in *Cannon v. University of Chicago*, 441 U.S. 677, 734 (1979) (dissenting opinion):

> The case for implication of judicial remedies was especially strong with respect to [the Railway Labor Act], as Congress had repealed its predecessor . . . after [this Court] had held that judicial enforcement of its terms was not available. Convinced that Congress had meant to accomplish more through the 1926 Act, and faced with the absence of an express administrative and judicial enforcement mechanism, the Court in, *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548 (1930), upheld an injunction enforcing the Act's prohibition of em-

in enacting the Wagner Act and in amending that Act in the LMRA, Congress did not—indeed could not—have had it in mind that local limitations periods would apply to such not-yet-divined actions. As we have seen, Congress never faced the limitations problem presented here as such.

To recognize this, however, is simply to pose—rather than to resolve—the problem here: in the absence of an express congressional decision, is § 10(b) or state law the appropriate source for determining the timeliness of fair representation actions. And for the reasons previously stated, we submit that, in light of the choices that Congress did make in enacting the NLRA, the application of

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ployer interference in employee's organizational activities. Buttressed by 1934 amendments to the Act that indicated congressional approval of this step, the Court in *Virginia R. Co. v. Railway Employees*, 300 U.S. 515 (1937), extended judicial enforcement to the Act's requirement that an employer bargain with its employees' authorized representative. Finally, in *Steele* . . . and *Tunstall* . . . the Court further held that the duty of a union not to discriminate among its members also could be enforced through the federal courts. In each of these cases . . . the implication of some kind of remedial mechanism was necessary to provide the enforcement authority Congress clearly intended.

Because the NLRA, in contrast to the Railway Labor Act, does embody an elaborate, express administrative enforcement mechanism, the decision whether to imply from the NLRA a cause of action for breach of the (implied) duty of fair representation involved different considerations. Thus, although dictum in *Wallace Corp., supra*, 323 U.S. at 255-56, decided the same day as *Steele* and *Tunstall*, suggested that a fair representation duty existed under the NLRA, *see* n.12, *supra*, it was not until a decade later—long after the LMRA with § 10(b) was enacted—that the Court found an implied fair representation cause of action under the NLRA. *Ford Motor Co. v. Huffman, supra*, 345 U.S. at 332 n.4; *Syres v. Oil Workers, supra*. Thus, the fact that § 10(b) is phrased as a limitations period only for the administrative actions that Congress expressly created does not support a negative inference that Congress considered but rejected applying § 10(b) to judicial fair representation actions. *See also* p. 13, *supra*.

§ 10(b), rather than local limitations periods of varying lengths—some longer and some shorter than the six-month period of § 10(b) [16]—best effectuates the intent of Congress in enacting that law.

II. ASSUMING, *ARGUENDO*, THAT STATE STATUTES OF LIMITATIONS, RATHER THAN § 10(b), SUPPLY THE LIMITATIONS PERIOD FOR FAIR REPRESENTATION CAUSES OF ACTION, THE STATE LIMITATIONS STATUTE FOR ACTIONS TO VACATE ARBITRATION AWARDS DETERMINES THE TIMELINESS OF THE FAIR REPRESENTATION CLAIM AT ISSUE HERE.

If the Court were to conclude, contrary to our showing in Part I, that state statutes of limitations, rather than § 10(b), apply to judicial fair representation claims, the Court's "task" here, as in *Mitchell*, would be "to determine which [state] limitations period is 'the most appropriate one provided by state law,'" 451 U.S. at 60. The court below concluded that New York's three-year limitations period for nonmedical malpractice actions should be applied to the cause of action against the union even though, following *Mitchell*, the court applied New York's ninety-day limitations period for actions to vacate arbitration awards to the cause of action against the employer. As we proceed to show, *Mitchell* compels the conclusion that the arbitration statute applies to both causes.

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[16] As we show in Part II, *infra*, if § 10(b) is not applicable here, then, under this Court's decision in *Mitchell*, New York's ninety-day statute of limitations for actions to vacate arbitration awards would apply, a shorter limitations period than that provided by § 10(b). Indeed, in *DelCostello v. Teamsters*, No. 81-2386, with which the instant case has been consolidated, the *plaintiff* seeks to avoid the applications of Maryland's thirty-day arbitration statute by urging the application of § 10(b); the defendants in that case are opposing § 10(b). This has happened in other cases as well. *E.g.*, *Kaftantzis v. D&L Transport Co.*, 531 F. Supp. 566 (N.D. Ill. 1982); *Fedor v. Hygrade Food Products Corp.*, 533 F. Supp. 269 (E.D. Pa.), *aff'd*, 687 F.2d 8 (3rd Cir. 1982); *Sheeran v. M.A. Bruder & Sons, Inc.*, 524 F. Supp. 567 (E.D. Pa. 1981).

At the threshold, it is important to be clear as to the nature of the claim against the union here. This case is a typical "hybrid § 301 breach-of-duty action," *Mitchell, supra*, 451 U.S. at 60 *n.* 2, in which it is alleged that the employer breached its collective bargaining agreement and that the union breached its duty of fair representation in prosecuting plaintiffs' grievances over the employer's asserted contractual breach.[17] In such cases, the claim against the union necessarily challenges the validity of the resolution of the grievance reached through the grievance-arbitration process—here the decision of the arbitrator [18]—just as does the claim against the employer. This is so for two reasons.

First, as this Court has recently ruled in *Bowen v. Postal Service, supra*, in a judicial fair representation action the union may be held liable for a portion of the plaintiff's *back wages* insofar as those back wages are attributable to the union's breach. Such liability necessarily depends on a finding, as part of the case against the union, that a breach of contract occurred and thus that the decision arrived at through the grievance-arbitration process—here the decision of the arbitrator—was incor-

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[17] The claim against the employer—the claim to which the court below applied the arbitration statute of limitations—arose under § 301 of the LMRA, 29 U.S.C. § 185 with jurisdiction predicated on that section; the claim against the union—the claim remaining before this Court—is a judicially implied cause of action under the NLRA for breach of the duty of fair representation, with jurisdiction predicated on 28 U.S.C. §§ 1331 and 1337 (*see* pp. 13-14, *supra*).

[18] In *Mitchell* the Court did not have occasion to decide whether the arbitration statute would apply if the grievance over the employer's asserted contract breach had been resolved by the parties short of the final step of the grievance procedure. That question, which has been raised in a number of subsequent, lower court decisions, *e.g., Hall v. Printing & Graphic Arts Union Local 3*, No. 82-1109 (7th Cir., Dec. 21, 1982); *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), is not presented here either, because in the instant case plaintiff's grievance was resolved, adversely to plaintiffs, in arbitration.

rect. Indeed, this Court has repeatedly recognized as much in ruling that in such "hybrid" actions the plaintiff's claim against the union requires a showing that the employer breached the contract: "To prevail against either the company *or the Union*, [plaintiffs] must not only show that [the employer's action] was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Hines*, *supra*, 424 U.S. at 570-71 (emphasis added); *Mitchell*, *supra*, 451 U.S. at 62.

Second, regardless of what relief is sought from the union—and back pay is almost invariably sought in "hybrid" fair representation cases—an allegation that the union breached its duty of fair representation in prosecuting a grievance necessarily implicates the validity of the resolution of that grievance in the grievance-arbitration process. For proof of the allegation that the union breached its duty would establish that the grievance process "malfunctioned" (p. 17, *supra*). Such proof would drain all precedential force from the arbitrator's decision and thereby defeat a critical function of labor arbitration: to develop the "law of the shop" by giving meaning and content to the collective bargaining agreement (pp. 16-17, *supra*). When an arbitral decision has been found by a court to have been rendered through a defective process, the parties cannot rely on that decision in their primary conduct in the workplace.[19]

This Court's holdings in both *Hines* and *Mitchell* rest on the recognition that an allegation that the union breached its fair representation duty necessarily entails

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[19] Justice Stevens' opinion "concurring in part and dissenting in part" in *Mitchell*, 451 U.S. at 71, states that unlike the claim against the employer, the claim against the union would not, if the plaintiff were to prevail, have the effect of undoing the arbitration award. 451 U.S. at 72-73. That statement was relied upon by the court below in reaching its decision in this case (Pet. App. 3a, 5a). For the reasons set forth in the text, we respectfully suggest that Justice Stevens' statement is simply not correct especially where, as here, plaintiff seeks an award of back pay from the union.

a challenge to the arbitration process. In *Hines* the Court held that "if it seriously undermines the integrity of the arbitral process the union's breach [of its fair representation duty] removes the bar of the finality provisions of the contract," 424 U.S. at 567, thereby enabling an employee to pursue a challenge to his employer's asserted breach of contract. The Court explained:

> Petitioners are not entitled to relitigate their discharge merely because they offer newly discovered evidence that the charges against them were false and that in fact they were fired without cause. The grievance processes cannot be expected to be error-free. The finality provision has sufficient force to surmount occasional instance of mistake. *But it is quite another matter to suggest the erroneous arbitration decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory*; for in that event error and injustice of the grossest sort would multiply. . . .' *In our view, enforcement of the finality provisions where the arbitrator has erred is conditioned upon the union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings.* [*Id.* at 571 (emphasis added)]

Similarly, in *Mitchell* the Court based its conclusion that the statute of limitations for actions to vacate arbitration awards applied to the "hybrid" cause of action against the employer in that case on the fact that proof of unfair representation by the union—which proof necessarily would challenge the arbitration process—was an essential element of the cause against the employer.[20]

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[20] The plaintiff in *Mitchell* had sued both the employer and the union, but only the claim against the employer was before this Court (as the union did not seek review of the lower court's decision with respect to the limitations period for the claim against it). Consequently, the holding of *Mitchell* is limited to "hybrid" claims against employers.

The *Mitchell* Court recognized the superficial plausibility of applying a contract limitations period to that cause, since "[i]t is true that respondent's underlying claim against his employer is based on the collective-bargaining agreement, a contract." 451 U.S. at 62. But the Court nonetheless rejected the applicability of that limitations period because, under *Hines*, proof of the union's breach of duty was necessary before the breach of contract issue could be reached:

> It is not enough . . . for an employee such as respondent to prove that he was discharged in violation of the collective-bargaining agreement. . . . [R]*espondent's characterization of his action against the employer as one for "breach of contract" ignores* the significance of the fact it was brought in the District Court pursuant to § 301(a) of the LMRA and *that the indispensable predicate for such an action is not a showing under traditional contract law that the discharge was a breach of the collective-bargaining agreement, but instead a demonstration that the union breached its duty of fair representation.* Since the conclusion of the Joint Panel was, under the collective-bargaining agreement, "binding upon all parties," *respondent was required in some way to show that the Union's duty to represent him fairly at the arbitration had been breached before he was entitled to reach the merits of his contract claim. This, in our view, makes the suit more analogous to an action to vacate an adbitration award than to a straight contract action.*
>
> We think that the unfair representation claim made by an employee against his union, even though his employer may ultimately be called upon to respond in damages for it if he is successful, is more a creature of "labor law" as it has developed since the enactment of § 301 than it is of general contract law. [451 U.S. at 62-63; emphasis added]

Thus, it was the alleged breach of the fair representation duty by the *union* in *Mitchell* that led the Court to

find the case against the employer analogous to an action to vacate an arbitration award rather than a contract action. The employer secured the benefit of the arbitration limitations period (even though the employer's alleged misdeed was a breach of contract) because, under *Hines*, proof of a breach of the *union's* duty—which breach, if proved, would necessarily establish the invalidity of the arbitral process—was an element of the § 301 claim against the employer. But given this reasoning it would be anomalous, at least, not to give a union the benefit of the arbitration limitations period where, as here, the claim is against the union itself for its asserted breach of duty. Indeed, since the elements of the claim against the employer and union are identical (p. 26, *supra*), application of a shorter limitations period for claims against employers would make no sense.[21]

It follows that if § 10(b) is not applicable here, New York's 90-day limitations period for actions to vacate arbitration awards is. In either event, respondents' claim against the Union, which was filed eleven months after the arbitrator rendered his decision, is untimely.

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[21] In the wake of *Mitchell*, most courts of apeals have reached this conclusion. *See Fedor v. Hygrade Food Products Corp.*, 687 F.2d 8 (3rd Cir. 1982); *DelCostello v. Teamsters*, No. 81-2086 (4th Cir. 1982), *cert. granted*, No. 81-2386; *Badon v. General Motors Corp.*, 679 F.2d 93, 98 (6th Cir. 1982); *Stevens v. Gateway Transportation Co.*, No. 82-1222 (7th Cir. 1982); *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981). The overwhelming weight of district court authority is in accord. *See* our petition for certiorari at 9 n. 3. The Eleventh Circuit, however, has followed the decision below and reached a contrary conclusion, *Hand v. Chemical Workers*, 681 F.2d 1308 (11th Cir. 1982), although that court has granted a petition for hearing *en banc* in that case, *id.* And two different panels of the Fifth Circuit have reached conflicting decisions on the issue. *Compare Edwards v. Sea Land Service, Inc.*, 678 F.2d 1276 (5th Cir. 1982) *with Rigby v. Roadway Express, Inc.*, 680 F.2d 342 (5th Cir. 1982).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, provides in pertinent part as follows:

Section 7 [29 U.S.C. § 157]:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 [29 U.S.C. § 158]:

Unfair Labor Practices.

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 9 [29 U.S.C. § 159]:

Representatives and elections.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10 [29 U.S.C. § 160]:

Prevention of Unfair labor practices.

* * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency desig-

nated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 7511(a) of the New York Civil Practice Laws and Rules, CPLR § 7511(a) (McKinney), provides as follows:

> An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

Section 214(6) of the New York Civil Practice Laws and Rules, CPLR § 214(6) provides in pertinent part as follows:

The following actions must be commenced within three years:

* * * *

> 6. an action to recover damages for malpractice; . . .

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Office-Supreme Court, U.S.
FILED
MAR 24 1983
ALEXANDER L. STEVAS,

No. 81-2408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

DONALD C. FLOWERS AND KING E. JONES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTION PRESENTED

Is the State statute of limitations for nonmedical malpractice the appropriate one to determine the timeliness of an action by an individual under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging that a union has breached its duty to represent him fairly?

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SUMMARY OF ARGUMENT

I. A. The duty of fair representation is but the application to labor unions of the profound and pervasive principle of our law that one who undertakes to represent another must treat with him fairly and not take advantage of him. As it traditionally has in other representational relationships, particularly the attorney-client relationship, the law will provide redress for the employee who has been injured by breach of that duty by his union bargaining representative. Since the holding to this effect in *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944), the "duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of Federal labor law." *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967).

The analogy between the duty owed by the union is so close to that owed by attorneys as to make clear that the most appropriate State statute to borrow in a § 301 action is that dealing with legal malpractice. Like the union, which is the exclusive bargaining representative of all the employees in the unit by virtue of statutory provisions, the attorney has special status by operation of law. Just as the union is more knowledgeable than the individual employee is or could be with respect to the collective bargaining agreement, the lawyer is more knowledgeable than the layman-client as to the law. The very function, experience and special abilities of the union and the attorney in their respective spheres grant them the ability to inflict great harm on the individual they are representing. In both cases, the special legal status and superior knowledge of the representative put the individual in a position where he has no alternative but utterly to rely upon the representative.

In general, then, the identities in function are marked between the union and the attorney. And the individual being represented is in the identically vulnerable position in each case. The identities are most clear and dramatic in the particular context of the adversary proceeding, such as the arbitration involved in this case. To safeguard him from abusive and arbitrary treatment from his representative, whether union or attorney, an individual plainly needs and therefore receives at the hands of the law the same general protections.

The elements of proving the breach of the representational duties are the same in both cases. To establish the breach of the duty of fair representation, the plaintiff must show that his union did not represent his interests faithfully, but in fact dealt with him in a discriminatory or arbitrary fashion. Further, the plaintiff must show that the union's misconduct caused him damage. In particular, he must show that the employer breached the collective bargaining agreement, and that he would have obtained relief for that breach if the union had conducted itself towards him properly. Likewise, in a legal malpractice action, the plaintiff must prove not only misconduct by his attorney but also the damage flowing from that misconduct. He must establish that he would have won his case, if his attorney had represented him properly. In sum, he must make the same kind of showing as the plaintiff in a § 301 action.

Accordingly, as the Court below held, the appropriate statute in this case is the New York statute for nonmedical malpractice. The parameters and functions of the duty of fair representation as imposed on unions are so close to those representational duties which the attorney owes his client as to invoke that statute.

B. The State statute of limitations for an action to vacate an arbitration award is not the appropriate one for an action for the breach of the duty of fair representation. Both the claims involved and the relief sought in the two actions stand in positions of polar contrast, not comparability. While the claim in an action for the breach of the duty of fair representation is directed to the conduct of the union, the claim sought in an arbitration under the collective bargaining agreement addresses the conduct of the employer. In identically stark contrast, the relief sought in the litigation against the union is damages flowing from the union's breach of duty; in the arbitration, the relief sought is enforcement of the employer's obligations under the collective bargaining agreement. Particularly when the alleged breach of the duty of fair representation centers upon the union's conduct in the arbitration itself, as in this case, it could not possibly have been the subject of the arbitration, and the arbitrator could not possibly have provided any relief. Consequently, the State statute of limitations governing actions to vacate arbitration awards is not an appropriate limitations period to borrow.

United Parcel Service, Inc. v. *Mitchell*, 451 U.S. 56 (1981) ("*Mitchell*"), relied upon the identity in both the claim made and the relief requested in the § 301 suit against the employer and in the arbitration, for its holding that the period in the State statute for vacation of arbitration awards was the appropriate limitations period for suits against the employer. Under the tests established in *Mitchell*, the contrasts in the claims, and the utter unavailability in arbitration of the relief requested against the union in a § 301 suit for breach of the duty of fair representation, render the statute concerning vacation of arbitration awards quite inappropriate for the § 301 suit against the union.

II. A. There is no disagreement that the general rule prescribes that the appropriate State statute of limitations be applied to a Federal cause of action, when Congress itself has prescribed no such statute. This has been the rule followed by this Court since at least 1830, and applied to a variety of Federal rights. Most significantly, it has been applied to § 301 actions, in both cases in which the question has arisen, *Mitchell* and *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) ("*Hoosier*").

B. This Congressional intention is reflected also in like Congressional action with respect to other labor statutes—in particular, §§ 302 and 303 of the Labor Management Relations Act, 29 U.S.C. §§ 186 and 187 ("LMRA"); and Title I of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 411-415 ("LMRDA"), and the Section of the Postal Reorganization Act tracking § 301, 39 U.S.C. § 1208(b).

Congress put §§ 301, 302 and 303 in different Titles and Subchapters of LMRA from those dealing with unfair labor practices. Congress provided no statute of limitations for any of those three Sections. Court decisions involving §§ 302 and 303, as well as the decisions of this Court under § 301, have uniformly held that the appropriate State statute of limitations should be applied. That interpretation of Congressional intention is correct and should be likewise applied to § 301.

Courts have accorded a similar analysis to actions under Title I of LMRDA. That Title is designed to protect individuals from arbitrary abuse of power by unions, just as is the duty of fair representation. This Court has held that there is an identity of purpose between the two statutes. By 1959, decisions of this Court had made clear that the duty of fair representation extended beyond

Railway Labor Act unions to those certified under the LMRA. The apparent Congressional intention that State statutes of limitations apply to protect the individual with respect to his Title I LMRDA rights should likewise apply to § 301 suits by individuals claiming a breach of the duty of fair representation.

When the Postal Reorganization Act became law in 1970, Congress must have been well aware not only generally of the duty of fair representation and the many decisions of this Court enforcing it, but also specifically of the *Hoosier* decision that State statutes of limitations should govern in § 301 suits. Congress generally provided for collective bargaining in the postal service, and in particular enacted a provision which closely tracks § 301, 39 U.S.C. § 1208(b). That provision incorporates no statute of limitations. Plainly, Congress intended that the law should continue to be that the appropriate State statute of limitations should be applied in § 301 actions, including claims of a breach of a union's duty of fair representation.

C. In *Hoosier*, this Court rejected the precise contention urged by Petitioners in this case, that this Court should itself fashion a uniform Federal statute of limitations for § 301 actions, importing the six-month statute applicable to charges for unfair labor practices. The Court held that Congress knew of the general rule and must have intended that it be applied, when it did prescribe the six-month rule for unfair labor practices but included no statute of limitations with respect to § 301 actions. Congress intended that State statutes of limitations apply. The elucidation of the law in *Hoosier*, in which a union was plaintiff, is equally valid law when unions are defendants.

This Court likewise rejected the concept that administrative standards should be applied to § 301 suits alleging breach of the duty of fair representation, in its decisions

overruling the defense, proffered by union defendants in such actions, that enforcement of the duty of fair representation was preempted and should be left exclusively to the National Labor Relations Board. *Humphrey* v. *Moore*, 375 U.S. 335, 344 (1964); *Vaca* v. *Sipes*, 386 U.S. 171, 176-184 (1967). Particularly in *Vaca*, this Court set out the differences in function and scope between an unfair labor practice procedure for such breach and a Court action under § 301, and emphasized that the latter must be available to redress complaints on behalf of injured employees. Every pertinent decision of this Court thus stands in opposition to judicial establishment of a six-month limitation, and militates for adherence to the general rule, consistently followed in § 301 actions, that the appropriate State statute of limitations should be followed. Accordingly, the judgment below should be affirmed.

ARGUMENT

I. THE NATURE OF THE DUTY OF FAIR REPRESENTATION, SAFEGUARDING THE INDIVIDUAL FROM UNFAIR AND INJURIOUS TREATMENT BY HIS REPRESENTATIVE, MAKES THE MOST APPROPRIATE STATE LIMITATIONS PERIOD IN THIS CASE THAT FOR NONMEDICAL MALPRACTICE ACTIONS, AS THE COURT BELOW HELD.

A. The Nature Of The Duties Owed By The Union To Each Employee In The Bargaining Unit, And The Elements Of Proof Of Breach Of That Duty, Are So Similar To Those Of The Attorney-Client Relationship As To Make The New York Nonmedical Malpractice Statute Of Limitations The Appropriate One To Borrow.

1. The Nature Of The Duties Are Similar.

a. The duty of fair representation

From its inception, the duty of fair representaion reflected basic principles of justice and law requiring the

conclusion that Congress could not have intended to leave the individual employee without legal recourse when he was subjected to unfair treatment in his employment relationships as a result of conduct by his exclusive bargaining representative. As this Court held in the seminal case of *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944), in relation to the provisions of the Railway Labor Act providing for exclusive representation of all employees in the unit by the bargaining representative:

> "The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. *It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf*, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed." *Id.* at 202 (emphasis added).

While the bargaining representative in performing its duties may make agreements and take action which might have unfavorable impact on some of those in the bargaining unit, the conduct of the representative must be based upon "relevant differences" and not "irrelevant and invidious" considerations such as the race discriminations involved in that case. *Id.* at 203. The individuals being represented have a right to be free from such unfair treatment at the hands of their representative. "That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction." *Id.* at 207.

As originally announced in *Steele* and in *Tunstall* v. *Brotherhood of Locomotive, Etc.*, 323 U.S. 210 (1944),

decided the same day, the duty of fair representation is the fruit of "two separate taproots." One is the exclusive right to represent all employees granted the union by the statute. The other applies the general criteria of the law demanding that those who assume the role of representing others owe them the duty to not take advantage of them or deal with them unfairly. *Steele* assumed and held that "a union that acts as a bargaining representative of employees *owes to the employees it represents the duty owed by an agent to its principal and by a fiduciary to its beneficiary*" (emphasis added)."[1] "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers." *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952).

"The union's duty to the employee is similar to attorney-client, trustee-beneficiary, director-stockholder, and other fiduciary relationships." Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned By His Union*, 41 U. Cinc. L. Rev. 55, 75 (1972). These traditional, long-standing legal principles, insistent upon protecting the individual from having his interests unjustly sacrificed, were of course well known to the Congress, and implicitly intended to apply to unions when they took upon themselves the representative's mantle.

This Court has recognized that the legal principles supporting the duty of fair representation, based as they were upon general standards of conduct for legal representatives, extended beyond the Railway Labor Act to the National Labor Relations Act. In a third decision

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[1] Summers, *The Individual Employee's Rights under the Collective Agreement: What Constitutes Fair Representation?* in THE DUTY OF FAIR REPRESENTATION, 60, 61 (McKelvey, Editor 1977).

announced the same day as *Steele* and *Tunstall*, before the Labor Management Relations Act had been enacted, this Court declared that a union, "[b]y its selection as bargaining representative . . . has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." *Wallace Corp.* v. *Labor Board*, 323 U.S. 248, 255 (1944). "The union, then, is agent and attorney for the employees in the appropriate unit after it has been designated as bargaining agent." *North Electric Manufacturing Co.* v. *National Labor Relations Board*, 123 F.2d 887, 889 (6th Cir. 1941).

"Since that landmark decision [*Steele*], the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). "To leave the employee remediless" in a situation when the breach of the statutory duty of fair representation has frustrated the individual employee's obtaining satisfaction in the grievance and arbitration procedure, "would, in our opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract." *Id.* at 185-186.

b. The duties owed by an attorney to his client

As its very name denotes, the essence of the duty of fair representation owed by the union to each employee is representational. The union is bound to represent fairly the interests of the employees in the bargaining unit in dealing with their employer, particularly in the negotiation, administration and enforcement of the collective

bargaining agreements. In general, it appears indisputable that these are the same types of interests for which an individual retains an attorney. When he feels he needs advice with respect to his rights and obligations, an individual consults a lawyer. One of the particular contexts in which an individual typically seeks advice is when he becomes involved in the negotiation, administration and enforcement of contracts.

Both the union and the attorney are the beneficiaries of special status by operation of law, endowing them with representational rights and duties. The union is the exclusive bargaining representative by operation of federal law. Similarly, the attorney is licensed to his special position of unique capability of representing individuals in court and performing other legal duties, by virtue of state law.

Whether dealing with his union or his attorney, the individual being represented does not have the training, experience or presumed abilities of the party who is representing him, with respect to obtaining a disposition favorable to him of the problem confronting him personally. An employee scarcely has available the time or educational or other background ever to become as knowledgeable as his union about the terms and conditions of his employment, for the negotiation and administration of the collective bargaining agreement is the very purpose of the union's formation and existence, and the very essence of its daily activities. A glance at only the lengthy, complex grievance provision of the collective bargaining contract in this case, Joint Appendix ("A.") 14-31, shows how far it is beyond the ken of ordinary steelworkers.

The contract is itself a system of law; if the individual is to be adequately represented when his interests become embroiled in it, he surely requires professional assist-

ance. In this respect there is a marked identity between the union and the lawyer. The ordinary person has only limited knowledge of the law, and is hardly in a position to attain the special knowledge and capacities which an attorney brings to legal issues. If the ordinary individual is to be adequately represented in dealing with legal affairs, particularly in an adversary legal proceeding, he requires the assistance of an attorney. He looks to his attorney, just as in his employment relationships he looks to his union, for effective and fair representation.

When an attorney represents a class, he must represent all individuals and groups within that class without discrimination or hostility. *See, e.g., Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978).[2] This is closely analogous to the representational duties of the union, which likewise may have to confront and fairly resolve conflicts of interest among the employees it reprsents. *See, e.g., Ford Motor Company* v. *Huffman*, 345 U.S. 330 (1953); *Humphrey* v. *Moore*, 375 U.S. 335 (1964).

In the special context of an adversary proceeding, which is central to this case, the very close similarities between the union and the attorney are most conspicuous. Indeed, an impartial observer would scarcely

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[2] "The class itself often speaks in several voices. Where there is disagreement among the class members concerning an appropriate course of action, it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole. If the attorney's decision in the face of such disagreement affects each class member more or less equally, and no allegation is made that the rights of a definable minority group within the class were sacrificed for the benefit of the majority, the attorney's views must be accorded great weight, and the trial judge's decision to ratify the attorney's action will seldom be overturned." 576 F.2d at 1216.

be able to observe any difference between the responsibilities and conduct undertaken and evidenced by a union representing an employee in an arbitration, and an attorney representing a client in an arbitration, or in any other adversary proceeding for that matter. Certainly the attorney is held accountable to professional standards of fairness towards his client and devotion to his client's interests. At the very least, those standards undoubtedly include the duty to be free from that kind of discriminatory or antagonistic dealing with his client which is called for by the duty of fair representation.

2. The Elements Of Proof Of Breach Are Similar.

Just as the nature of the duties are essentially the same, so are the elements of proof of a breach of duty. In both cases, the plaintiff must prove not only that the representational duty owed him has been breached, but also that had there been no breach and his representation had been conducted fairly, he would have been successful in vindicating his claim. To prove a breach of the duty of fair representation directed to the conduct of the union in resolving disputes with the employer under the collective bargaining agreement, the plaintiff must demonstrate both that the union conducted itself unfairly against him and that this conduct damaged him. In the light of *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) *("Hines")*, *Mitchell* and *Bowen* v. *United States Postal Service*, 459 U.S. ____, 103 S. Ct. 588 (1983), it seems clear that an element of proof in a breach of the duty of fair representation case is the demonstration that the employer's breach of the contract would have been established if the union had not breached its duty to the plaintiff. In this case the complaint unmistakably alleges union conduct that would constitute a breach of duty of fair representation, inasmuch as, speaking generally, it

alleges the same type of union conduct in conducting an arbitration as was before this Court in *Hines*. A. 8-10.

Just as the plaintiff in a fair representation case must establish that the employer breached the contract, the client alleging failure to file in time, failure to prosecute properly, or similar professional conduct related to an adversary proceeding, must prove that he would have won the case had the attorney not breached his duty. *See, e.g., Garguilo* v. *Schunk*, 58 A.D.2d 683, 395 N.Y.S.2d 751 (1977); *Carpenter* v. *Weichert*, 51 A.D.2d 817, 379 N.Y.S.2d 191 (1976).

"Proving that he suffered a real injury from the attorney's conduct is often the client's most difficult task. He must virtually re-litigate a case that has already been decided against him and show that the earlier judgment was an erroneous result caused by his attorney's negligence. This 'rehearing' is not, however, a collateral attack on the judgment, since the winning party in that suit is not affected by the client's present action against his attorney." Leavitt, *The Attorney As Defendant*, 13 Hastings L.J. 1, 29 (1961).

The feature of requiring proof involving a third party as a condition of success for the plaintiff in litigation is not unique to these cases. To hold a trustee liable for dereliction of duty in prosecuting, collecting or defending a beneficiary claim, for example, the beneficiary must show that the action which it is alleged the trustee should have taken would have been successful in protecting the beneficiary's interests. *See, e.g.*, 2 *Scott on Trusts* §§ 177-178 (3rd ed. 1967).

These considerations demonstrate the essential identity between the representational relationship between the union and the employee, and that between the attorney

and his client. These similarities are so close between the nature of the duty, and the elements required to establish its breach, as to provide ample basis for affirmance of the judgment below. The New York statute of limitations applicable to nonmedical malpractice is indeed the most appropriate one to borrow.

B. A State Statute Of Limitations Applicable To Actions To Vacate An Arbitration Award Is Inappropriate For Actions For Breach Of The Duty Of Fair Representation By A Union.

The Court below would have committed clear error had it selected the State statute providing a time limit for suits to vacate arbitration awards. There is no similarity between the claim asserted and the relief requested in an action for breach of the duty of fair representation against a union under § 301 and those in the arbitration proceeding between the union and the employer under the collective bargaining agreement. The claim asserted in the fair representation action is breach of the duty owed by the union to the individual employee. That is certainly not the claim in the arbitration. There the union is asserting a breach of the collective bargaining agreement by the employer.

In the § 301 action by the individual against the union, the relief sought is damages arising from the union's breach of the duty of fair representation. In the arbitration, the relief sought flows from the employer's breach of the collective bargaining contract.

If the employer is not a party to the action for breach of the union's duty of fair representation, the relief which might have been obtainable in arbitration, had the union conducted itself properly, may no longer be obtainable. But there is no need to join the employer to hold the union accountable for the damages which have resulted from its

misconduct. *Vaca* v. *Sipes*, 386 U.S. 171 (1967), provides sufficient illustration of an action brought solely against the union for breach of its duty of fair representation. "If both the union and the employer have independently caused damage to employees, the union cannot complain if separate actions are brought against it and the employer for the portion of the total damages caused by each." *Czosek* v. *O'Mara*, 397 U.S. 25, 29 (1970). *Bowen* v. *United States Postal Service*, 459 U.S. ____, 103 S. Ct. 588 (1983), provides sufficient illustration for assessment of damages against only the union; as the union had not taken the case to arbitration, there appeared no possibility of obtaining the relief which would have been attained in a successful arbitration, the plaintiff's reinstatement to his job.

In any event, the employer's breach *vel non* would be established upon the basis of the record in the fair representation case. That would almost inevitably be a quite different record from that in the arbitration, and one far more favorable to the employee. After all, the crux of the allegations in this case, as in *Hines*, is precisely the union's misconduct at the arbitration, in deliberately failing to avail itself of the ready means to make a record in arbitration most favorable to the employee.

The conduct which is the subject of the arbitration is the conduct of the employer, which occurred long before the arbitration proceeding. The conduct to be tried in this case against the union is breach of the duty of fair representation at the arbitration hearing. Obviously, it did not arise, and could not possibly have arisen, prior to the arbitration. Certainly the issue of breach of the duty of fair representation was not before the arbitrator. It would not be possible for the arbitration award to decide anything about it. And in fact the award at bar is entirely

confined to the collective bargaining agreement, and decides—and implies—absolutely nothing with respect to the relationship between Respondents and their union representatives who conducted the arbitration of the claimed breach by their employer of the contract which directly affected them. A. 62-67.

These hard, objectively irrefutable facts demonstrate that *Mitchell* did not reach and should not be extended to an action against a union for breach of the duty of fair representation. *Mitchell* was confined to the employer and rested upon the identity of claim and relief as against the employer. Plaintiff in that case raised "the same claim" that was raised, and sought "the same relief" that was sought, in the arbitration proceeding. 451 U.S. at 61. That simply cannot be said of the action for breach of the duty of fair representation.

While *Mitchell* held that an element of the § 301 claim against the employer was proof that the union had breached its duty of fair representation, this discussion and holding were entirely in the context of a suit against the employer. The "arbitration award stands between the employee and any relief which may be awarded against the *company*." 451 U.S. at 63, n.4 (emphasis added); and *id.* at 71, 75, n.7 (Opinion of Justice Stevens, concurring in part and dissenting in part). In *Mitchell*, as it had in *Hines*, the Court held that the arbitration award would bar a § 301 action against the employer, unless the breach of duty on the part of the union could be shown. But that does not change the nature of the duty of fair representation or the proof required to establish its breach. That is and remains different from the nature of the duty and of the proof in an action against the employer.

In short, the focus and substance of this action for breach of the duty of fair representation are so different

from those in a suit to vacate an arbitration award that there appears no support for selecting the State statute applicable to the latter as the appropriate limitations period. The fair representation action is indeed close to a suit for nonmedical malpractice. That is the appropriate State statute of limitations which should be borrowed under the circumstances of this case.

II. THE LAW IS CLEAR AND WELL FOUNDED THAT WHEN CONGRESS HAS NOT SPECIFICALLY PROVIDED A STATUTE OF LIMITATIONS FOR A FEDERAL CAUSE OF ACTION, THE APPROPRIATE STATE STATUTE GOVERNS.

A. This General Rule Is Well Established And Has Been Followed, Apart From § 301 Actions.

There is no question that the general rule is that the appropriate limitations period of the State in which the suit is being litigated will govern when Congress has prescribed no limitations period for a suit upon a Federal cause of action. Based from its inception upon the Congressional prescription in the Rules of Decision Act, now 28 U.S.C. § 1652, that rule has been consistently recognized and respected by this Court for over 150 years.

The Rules of Decision Act has been essentially unchanged since the original Judiciary Act of 1789. In its present form, it provides "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." Based upon this statute, this Court in 1830 tested the timeliness of an action against the Register of a United States land office for failure to perform his duty by reference to the general State statute of limitations. *M'Cluny* v. *Silliman*, 3 Pet. 270. Since then, the rule has been

applied over the years to a variety of different Federally created rights. *Campbell* v. *City of Haverhill*, 155 U.S. 610 (1895) (patent infringement); *McClaine* v. *Rankin*, 197 U.S. 154 (1905) (action against shareholder of national bank); *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906) (Sherman Act); *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914) (Civil Rights Act of 1870); *Cope* v. *Anderson*, 331 U.S. 461 (1947) (National Bank Act); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (Civil Rights Act of 1866); *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980) (Civil Rights Act of 1871).

The "adoption of state statutes seems so well established that the failure to designate a limitation period has been said to indicate a congressional intention that state law be applied." Note, 76 Harv. L. Rev. 1306, 1307 (1963).

B. This General Rule Has Been Adhered To In § 301 Actions.

This general rule has been applied by this Court to actions based upon § 301 of LMRA, in both cases in which it has arisen. *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981). In the former case, which was a suit by a labor organization against an employer for breach of a collective bargaining agreement,[3] the Court reviewed and relied upon the general rule. 383 U.S. at 703, 707. The Court was confronted with, and rejected, the contention that it should judicially establish one standard of timeliness for § 301

[3] While the Court in so many words confined its decision to that situation, 383 U.S. at 705, n. 7, it is respectfully submitted that the rationale embraces the action involved here, as is shown in the discussion in this paragraph of the text and also pp. 29-33, *infra*.

suits, which would be uniform in its application throughout the United States. *Id.* at 701-704. In particular, this Court expressly rejected the suggestion, which has nevertheless again been proffered by Petitioners in this case, that the presence of the six-month limitation governing unfair labor practices should be viewed as a talisman that Congress meant for the judiciary to engraft that limitation upon § 301 actions. Precisely to the contrary, this Court held that Congress must have intended that the general rule should apply to § 301 actions, when it provided no limitations period for Court suits based upon § 301 and at the same time establishing a six-month limitation period for charges of unfair labor practice filed with the National Labor Relations Board; thus Congress intended that the most appropriate State limitations period would govern. *Id.* at 703-704. Congress must have known of the well-established and long-honored general rule; and expected that it would result in the application of the most appropriate State statute in § 301 suits.

Mitchell likewise adopted a state limitations period for a § 301 action against an employer. Indeed, the issue to be decided was held to be "which state statute of limitations period should be borrowed and applied to an employee's action against his employer under § 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185(a), and *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976)." 451 U.S. at 58. The Court relied upon and followed the *Hoosier* holding that " 'the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." 451 U.S. at 60, quoting *Hoosier*, 383 U.S. at 704-705.

C. Congress Has Evidenced Its Intention That State Limitations Periods Be Applied To Actions Under § 301, By Not Enacting A Uniform Federal Limitation Period In Related Provisions Of LMRA And In Other Labor Laws.

The omission of a statute of limitations from § 301 reflects a Congressional intention that State limitations periods should apply, rather than an implicit direction or invitation to this Court itself to establish a Federal one. This conclusion is impelled not only by the general rule and the decisions adhering to it and applying it to § 301, discussed above, but also by the identical Congressional action of omitting any limitations periods in (1) §§ 302 and 303 of LMRA, (2) Title I of LMRDA, and (3) § 1208(b) of the Postal Reorganizaton Act, 39 U.S.C. § 1208(b) (1976).

1. The Statutes Of Limitation Treatment Of §§ 302 And 303 Should Be Accorded To Suits Against The Union.

When Congress enacted the Labor Management Relations Act of 1947, it drew a clear line of legislative demarcation between amendments to the National Labor Relations Act, including the imposition of the six-month limitation, and § 301 and its contiguous provisions, §§ 302 and 303. Congress knowingly placed them in separate titles. Title I dealt with the amendment of the National Labor Relations Act. 61 Stat. 136 (1947). With the intervening enactment of Title II dealing with conciliation of labor disputes and national emergencies, 61 Stat. 152 (1947), Congress lodged § 301, together with only two following Sections, in Title III, which it labeled, "SUITS BY AND AGAINST LABOR ORGANIZATIONS." 61 Stat. 156 (1947). As now codified in Chapter 7, "LABOR MANAGEMENT RELATIONS" of Title 29 of the United States Code, the six-month provision appears in Subchapter II, entitled "NATIONAL LABOR RELA-

TIONS." 29 U.S.C. pp. 713, 723 (1976). Contrastingly, § 301 appears with §§ 302 and 303, in Subchapter IV, entitled, "LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT." 29 U.S.C. p. 735 (1976). As this Court has held in actions under § 301, Courts have consistently applied the State statute of limitation considered most analogous in actions under the other Sections, 302 and 303, which were enacted and placed by Congress together with § 301.

a. Section 303

Section 303 is especially instructive as to the Congressional intention, because it in terms provides for a suit against the union on a claim which can be established only by reference to an unfair labor practice; and it also makes explicit reference to § 301. Subsection (a) of § 303 makes it unlawful "for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title."[4] And Subsection (b) grants a right of suit "in any district court of the United States subject to the limitations and provisions of section 185 of this title [§ 301] without respect to the amount in

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[4] Section 303 has been worded this way since 1959, as amended in the Labor-Management Reporting and Disclosure Act. Pub.L. 86-257, §§ 704-705 (1959). As enacted in 1947, § 303(a) specified the conduct subject to suit, in terms similar to § 8(b)(4) of the LMRA. Section 8(b)(4) was itself amended in the LMRDA. In terms of the statute of limitations, the amendments do not appear pertinent. For example, in *Hyatt Chalet Motels, Inc.* v. *Carpenters Local 1065*, 430 F.2d 1119 (9th Cir. 1970), which arose after the Section had been amended, the Ninth Circuit adhered to the holding in *International Union of Operating Engineers* v. *Fischbach and Moore*, 350 F.2d 936 (9th Cir. 1965), *cert. denied*, 384 U.S. 904 (1966), which arose under the earlier language of § 303; *Fischbach and Moore* is discussed in the text. *See* p. 23, *infra*.

controversy, or in any other court having jurisdiction of the parties. . . ."

In the light of this Congressional bonding of §§ 301 and 303, surely some Court would have held that the six-month unfair labor practice limitation would be applicable to § 303 claims, if there were any validity to Petitioners' position that the six-month administrative limitation should be applied to § 301 suits. Such a result might also seem to flow from the Congressional prescription that suit under § 303 should be "subject to the limitations and provisions of section 185 of this title." In fact, however, the administrative limitation has not been applied to § 303 suits, even though that Section in terms defines the cause of action as equivalent to an unfair labor practice.

In the decisions under § 303, there has been no suggestion that any statute of limitations would apply other than the appropriate State statute. Indeed, it was accepted by both parties, and implicitly accepted by this Court, that the State statute applicable to actions for injuries to person or property would be applicable to a § 303 suit, in *United Mine Workers of America* v. *Railing*, 401 U.S. 486 (1971), vacating and remanding to determine when the cause of action accrued, *Railing* v. *United Mine Workers of America*, 429 F.2d 780 (4th Cir. 1970). As the Court of Appeals held, indicating that there was no challenge to the District Court's ruling:

> "Section 303 of the Labor Management Relations Act contains no statute of limitations. The district court referred to state law to determine the pertinent period of limitation to be applied." 429 F.2d at 781.

In doing so, the District Court relied upon the general rule. *Railing* v. *United Mine Workers of America*, 276 F. Supp. 238, 241 (N.D.W.Va. 1967).

Likewise, in *International Union of Operating Engineers* v. *Fischbach and Moore*, 350 F.2d 936 (9th Cir. 1965), *cert. denied*, 384 U.S. 904 (1966), the Court considered whether the six-month limitation period in § 10(b) should be applied to § 303 cases. After acknowledging that there were considerations which might support judicially decreeing such a limitation, the Court declared:

> "But while we are tempted by Mr. Justice Douglas's appeal for 'judicial inventiveness', made in Textile Workers Union v. Lincoln Mills, [citations], we cannot adopt that phrase as a shibboleth to justify the pronouncement of a rule which would seem to be meet only for congressional action. In fact, *the very presence of a six-month limitation period in § 10(b) and the absence of any period of limitation in § 301, 29 U.S.C. § 185, and § 303 makes us more certain of our duty of forbearance.*
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> * * *
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> "The fact is that Congress has remained silent on the matter of a limitations period applicable to § 303, and it does not appear that the omission was unintentional or intended to require 'judicial legislation.' Unlike many facets of state law *state statutes of limitations are commonplace and familiar to Congress, which, cognizant of the general federal rule, cannot be presumed to have expected the courts to skirt it.*" 350 F.2d at 938, 939 (emphasis added).

Other cases in which the reference to a State statute of limitations for § 303 claims was recognized as in effect so clear as to be indisputable include: *Consolidated Express* v. *New York Shipping Association*, 602 F.2d 494 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980); *United Mine Workers of America* v. *Meadow Creek Coal*, 263 F.2d 52 (6th Cir. 1959); *Kipbea Baking* v. *Strauss*, 68 LRRM 2397 (E.D.N.Y. 1968), *aff'd*, 411 F.2d 467 (2d Cir.

1969); *Peterson* v. *Musicians, Local 802*, 82 LRRM 2144 (S.D.N.Y. 1972) (rejecting the contention that the § 10(b) period should be applied).

b. Section 302

Like the decisions involving § 303, those involving § 302 have applied State statutes of limitations, and recognized that State statutes should be applied to §§ 301 and 303, as well as § 302.

In *Daniel* v. *International Brotherhood of Teamsters*, 410 F. Supp. 541, 554 (N.D.Ill. 1976), *aff'd on another issue*, 561 F.2d 1223 (7th Cir. 1977), *rev'd on another issue*, 439 U.S. 551 (1979), for example, the District Court held as follows:

> "Although the issue of whether a state statute of limitations should be applied in a federal court suit under section 302(e) has not been decided, state limitation periods have been applied in federal court suits under sections 301 and 303 of the NLRA." *Hoosier* and *Fischbach and Moore* were cited.

State limitations periods were applied in § 302 suits also in *Valle* v. *Joint Plumbing Industry Board*, 623 F.2d 196, 202, n.10 (2d Cir. 1980); *Morgan* v. *Laborers Pension Trust Fund*, 433 F. Supp. 518, 526 (N.D.Cal. 1977) ("Because neither section [301 nor 302] contains a specific statute of limitations, the Court must look to the most appropriate period of limitation provided for by California law").

2. Decisions Under Title I Of LMRDA, Which Has The Same General Purpose As The Duty Of Fair Representation, Protecting Individuals Against Unfair And Arbitrary Exercise Of Power By Unions, Are Also Probative That Congress Intended That State Statutes Of Limitations Should Apply In § 301 Actions.

Like the duty of fair representation, the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. §§ 401 *et seq.* (1976) ("LMRDA"), provides remedies for unfair treatment of individuals by unions. While in terms addressing the union-member relationship, Congress was obviously concerned with the impact of unfair union conduct in that relationship upon interstate commerce and the employment relationship.[5] In its declaration of findings, purposes, and policy in the LMRDA, Congress included the following:

> "[I]n order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.
>
> * * *
>
> "The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor

[5] Respondents were members of Petitioner Unions, A. 6. They were required to be, by virtue of Article III, Section 2(a) of the Agreement between the Bethlehem Steel Corporation and Petitioner International.

> Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended. . . ." LMRDA, §§ 2(a), (c), 73 Stat. 519 (1959), 29 U.S.C. §§ 401(a), (c) (1976).

In particular, Title I of LMRDA, entitled "BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS," 29 U.S.C. §§ 411-415 (1976), patently means to insure that the individual is treated fairly, particularly with respect to participation in union affairs and effectively expressing his views regarding union policies, certainly including those involved in collective bargaining units. That Title established duties which are kindred to those encompassed by the duty of fair representation.

This kinship has been recognized by this Court:

> "It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation. That duty 'has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal law.' *Vaca* v. *Sipes*, 386 U.S. 171, 182. For the same reason Congress in the 1959 Landrum-Griffin amendments, 73 Stat. 519, enacted a code of fairness to assure democratic conduct of union affairs by provisions guaranteeing free speech and assembly, equal rights to vote in elections, to attend meetings, and to participate in the deliberations and voting upon the business conducted at the meetings." *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 181 (1967).

Because it was dealing with the identical national labor policy reflected in the duty of fair representation, Congress in 1959 had ample opportunity to specify a Federal statute of limitations if it had intended that one be

attached to violations of that duty. Obviously, Congress was aware of the interrelationships between the NLRA and LMRDA. Indeed, LMRDA enacted amendments to the NLRA. *See, e.g.*, n. 4, p. 21, *supra*. Some of them attached time limits or time definitions. By 1959, the duty of fair representation, which had been enunciated by this Court in 1944, had already been applied to unions certified under the National Labor Relations Act. *Syres* v. *Oil Workers*, 350 U.S. 892 (1955); *Ford Motor Company* v. *Huffman*, 345 U.S. 330 (1953). Consequently, there is quite persuasive if not dispositive significance in the fact that Congress enacted no statute of limitations with respect to suits under Title I of LMRDA. The unavoidable inference is that Congress intended that the appropriate State statute of limitations should apply to actions alleging unfair treatment of individuals by unions.

> " 'To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration.' " *Allis-Chalmers, supra*, at 194, quoting *Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 291-292 (1960).

The views of subsequent Congresses "are entitled to significant weight . . . particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corporation* v. *Shell Oil Company*, 444 U.S. 572, 596 (1980).

Courts have been unanimous in finding that State statutes of limitations must be applied to Title I LMRDA actions because Congress did not impose any Federal statute. These decisions include: *Copitas* v. *Retail Clerks International Association*, 618 F.2d 1370 (9th Cir. 1980);

Howard v. *Aluminum Workers*, 589 F.2d 771, 774 (4th Cir. 1978); *Dantagnan* v. *I.L.A. Local 1418*, 496 F.2d 400 (5th Cir. 1974); *Sewell* v. *Grand Lodge of International Association of Machinists*, 445 F.2d 545 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972); *Harrison* v. *AFL-CIO*, 452 F. Supp. 102 (E.D.Pa. 1978); *Berard* v. *General Motors*, 493 F. Supp. 1035 (D.Mass), *aff'd mem.*, 657 F.2d 261 (1st Cir. 1980), *cert. denied*, 451 U.S. 987 (1981); *Woods* v. *Local Union Number 613, IBEW*, 404 F. Supp. 110 (N.D.Ga. 1975).

3. The Congressional Intention That State Statutes Apply Is Likewise Reflected In The Lack Of A Uniform Federal Statute For Suits Under 39 U.S.C. § 1208(b), Which Tracks § 301.

In the Postal Reorganization Act of 1970, 84 Stat. 719, Title 39, U.S.C. (1976), which was a comprehensive overhaul of the country's Postal Service, Congress provided for the right of Postal employees to engage in collective bargaining. By 1970, there had been a number of decisions by this Court on the duty of fair representation, including *Hoosier*, which squarely addressed and decided a § 301 limitations issue in terms of the most appropriate State statute. In authorizing suits applicable to the employment relationship in the Postal Service, Congress virtually copied § 301, in 39 U.S.C. § 1208(b). That Section contains no statute of limitations. There is no conclusion reasonably to be drawn other than that Congress intended and expected that the statute of limitations applicable to suits for breach of the duty of fair representation by unions with collective bargaining agreements with the United States Postal Service would be the appropriate State statute.

D. Every Pertinent Decision Of This Court Rejects Adoption Of The Six-Month Limitations Period Proffered By Petitioners.

By no means are Petitioners the first to urge this Court to foresake the general rule for § 301 actions, and instead mobilize judicial creativity to impress those actions with the six-month unfair labor practice limitations period. Precisely that contention has been before the Court and rejected on a number of occasions. This Court rendered that judgment most directly and indistinguishably in *Hoosier*. Moreover, it elucidated the law to identical effect also in the series of cases rejecting the plea of preemption in § 301 suits brought by individuals.

Like the Petitioner Unions in this case, the union in *Hoosier:*

> "contends that this suit cannot be barred by a statute of limitations enacted by a State. We are urged instead to devise a uniform time limitation to close the statutory gap left by Congress. But the teaching of our cases does not require so bald a form of judicial innovation." 383 U.S. at 701.

As discussed above, see pp. 18-19, this Court in *Hoosier* was met with the same type of arguments as to the need for uniformity and the prevention of different decisions in different forums as Petitioners are urging here. *See, e.g.*, Brief of Petitioners ("Pet. Br.") 7-8, 21.[6] While Petition-

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[6] The realism of Petitioners' implication that swift clarification of the law of the shop is needed by them may be tested by their leisurely processing of Respondents' grievances. *Compare* the tones, *e.g.*, of Pet. Br. 17 *with* the reality of the history recited at A. 62. In any event, arbitration decisions are directed only to the particular grievances. Conceptually, they do not constitute binding precedent for subsequent arbitrations. There is no provision in the arbitration clause at bar reflecting agreement that *res judicata* or *stare decisis* principles should be applied to their arbitrations.

ers' attempts to distinguish *Hoosier* are far from clear, they appear to be predicated upon the notion that a § 301 case involving the grievance procedure is different from other § 301 cases for breach of the collective bargaining agreement or to enforce the provisions of the agreement. *See, e.g.*, Pet. Br. 12, n.4. There is not the slightest support for this in *Hoosier* or in the Congressional provisions or purposes.

Hoosier arose out of a dispute between a union and an employer over interpretation of their collective bargaining agreement. This Court held that there was no "need for uniformity" for such a suit because it did not "threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it." 383 U.S. at 702. In *Hoosier* the collective agreement had already been formed, and that the controversy before it was as to its interpretation. Identically here, the consensual process of arbitration has already taken place; this is not a suit to enforce that obligation. The assertion that the Union engaged in misconduct in this particular arbitration under this collective bargaining agreement does not "threaten the smooth functioning" of arbitration under this collective bargaining agreement, any more than the suit in *Hoosier* for interpretation of the contract affected the process by which that contract was formed. As *Hoosier* recognized, "[f]or the most part, statutes of limitations come into play only when these processes have already broken down." 383 U.S. at 702. *Hoosier* thus rejected what appears to be a purported foundation for Petitioners' argument, that the breaking down or malfunctioning of the process of negotiation or arbitration in a particular case musters support for the conclusion that there ought to be a uniform Federal statute of limita-

tions imported from unfair labor practice processes, procedures and provisions.

The language of § 301 includes no such distinction as Petitioners seek to draw between breach of duty suits after an arbitration concerning the union's conduct of the arbitration, and other suits based upon that Section. The language and intention of § 301 likewise admit of no such segregation. Plainly, the intention of Congress was to establish jurisdiction in the Federal Courts over all suits against employers or unions arising out of the collective bargaining and employment relationships. "Section 301 contemplates suits by and against individual employees as well as between unions and employers. . . ." *Hines*, 424 U.S. at 562.[7]

The aura of special, self-serving pleading infects the futile attempts of Petitioners to distinguish *Hoosier*, in which a union was plaintiff in a suit to enforce a collective bargaining agreement under § 301, from cases where individuals are plaintiffs suing either a union for breach of the duty of fair representation, an employer for breach of the collective bargaining agreement, or both. If the six-month limitation should not apply to the former suit, as *Hoosier* held it should not, it likewise should not apply in the latter. The issue of the statute of limitations under § 301 should not be treated as an elevator, depending upon whether the union is on the up or down side of the litigation caption.

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[7] Petitioners' attempts to question § 301 jurisdiction in suits by employees against the union representative are thus illusory. Pet. Br. 13-14, n. 5. Equally illusory is the purported distinction between "statutory" and "contractual" duties, *id.*, for § 301 is the statute which establishes jurisdiction to enforce against unions the duties they owe employees by being able to enter into, and entering into, contractual relationships.

In addition to the square holding in *Hoosier*, there is unmistakable rejection of Petitioners' contention in the decisions which have rejected the plea of preemption. Unions have resisted fair representation suits on the ground that they were arguably unfair labor practices, so that the exclusive remedy should be an unfair labor practice charge, subject to the six-month limitation. This Court has repeatedly rejected such a plea. *Humphrey* v. *Moore*, 375 U.S. 335, 344 (1964); *Vaca* v. *Sipes*, 386 U.S. 171, 176-184 (1967); *cf. Smith* v. *Evening News Association*, 371 U.S. 195, 196-198 (1962).

In *Vaca*, the Court emphasized that the nature and function of the duty of fair representation are to protect the individual employee. Treating a breach of that duty as an unfair labor practice would be insufficient because the Board had to be concerned with its view of the public interest, rather than safeguarding the interests of each individual employee; and an individual would not be able to obtain judicial review if the General Counsel of the Board elected not to proceed. If Courts would be "foreclosed by the NLRB's *Miranda Fuel* decision from this traditional supervisory jurisdiction [reflected in the duty of fair representation], the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint. . . ." *Id.* at 182. "The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies." *Id.* at n.8. But the principles of justice and law embodied in the duty of fair representation are so deep rooted that the Courts should be open to all who allege a breach of that duty, including "complaints on behalf of injured employ-

ees where the injury complained of is 'insubstantial.'" *Ibid.*[8]

Now to sustain Petitioners' plea for the six-month period would thus require this Court to turn its back on a long, consistent line of its own decisions. It would not be conformable with the decisions and the rationale in *Hoosier*, nor with the similar reasoning in the preemption cases. In addition, it could not be reconciled with the long-established rule that when Congress did not itself prescribe a statute of limitations for a Federal right, this Court will not march in to decree such a Federal statute in lieu of Congressional action, but will apply the most appropriate State period. There is no justification here for creating a Federal standard. "Unlike federal borrowing, state borrowing is well-defined by usage and today provides the general rule for limiting otherwise unlimited federal actions." Note, *Limitation Borrowing in Federal Courts*, 77 Mich. L.Rev. 1127, 1134 (1979).

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[8] When Congress provides "two different remedies" that is strong evidence "that the remedies provided were to be independent of each other." *International Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 244 (1952) (unfair labor practice charge and § 303 suit). *See also, e.g., Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (when Congress provides two different remedies, the conclusion must be that they are "separate from and independent of" each other, *id.* at 466).

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

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Office-Supreme Court, U.S.
FILED
APR 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-2408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

v.

DONALD C. FLOWERS AND KING E. JONES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I. THE § 10(b) ISSUE

1. The major premise of respondents' argument for applying state limitations statutes to fair representation claims is that, "[t]he omission of a statute of limitations from § 301 reflects a Congressional *intention* that State limitations period should apply" to such claims (Resp. Br. at 20) (emphasis added). Thus, respondents find it largely unnecessary to discuss our analysis as to why application of the § 10(b) limitations period would best effectuate congressional policies because, in their view, Congress consciously opted for local limitations periods in enacting the Labor Management Relations Act ("LMRA"). As we proceed to show, respondents' position suffers from two independent flaws.

First, the fair representation duty and cause of action were not created by § 301 but have an existence independent of that provision. Section 301 is, of course, in terms a grant of jurisdiction to the federal courts to adjudicate "[s]uits for violation of contracts between an employer and a labor organization . . . or between . . . labor organizations." From this jurisdictional grant, the Court in *Textile Workers v. Lincoln Mills*, 353 U.S 448 (1957), implied a federal duty on the part of employers and unions to adhere to their contracts.

But the federal duty of fair representation was *not* derived from § 301; rather, that duty was found to be "implicit in the *National Labor Relations Act* because that statute"—specifically § 9—"affords unions exclusive power to represent all employees of a bargaining unit." *Electrical Workers v. Foust*, 442 U.S. 42, 46-47 n.8 (1979) (emphasis added).[1] And the judicial cause of ac-

[1] The Court in *Foust* elaborated on the point as follows:

> [W]hen Congress empowered unions to bargain exclusively for all employees in a particular bargaining unit, and thereby

tion for breach of the duty likewise was "judicially 'implied from the statute and the policy which it had adopted,'" *id.* at 47, in order to effectuate the fair representation duty. Thus, the source of the fair representation duty and cause of action is the NLRA (*i.e.*, the Wagner Act as amended by Title I of the LMRA) and not § 301. And the fair representation cause of action exists independently of § 301.[2] Because the fair representation cause of action was not created by the enactment of § 301, Congress' omission of a limitations period in § 301 does not support an inference that Congress intended by that omission to apply state limitations laws to fair representation claims.

Second, even if *arguendo* the fair representation cause of action were a creature of § 301, the absence of a § 301 limitations period still would not be determinative here.

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subordinated individual interests to the interests of the unit as a whole, it imposed on unions a correlative duty "inseparable from the power of representation" to exercise that authority fairly. [442 U.S. at 46]

See also e.g., Hines v. Anchor Motor Freight Inc., 424 U.S. 554, 564 (1976); *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 64 (1975); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *cf. Steele v. L. & N.R. Co.*, 323 U.S. 192 (1944).

[2] That the fair representation cause of action is not dependent for its existence upon § 301 is confirmed by two additional considerations. First, it is clear that jurisdiction over fair representation claims exists apart from § 301. In *Tunstall v. Brotherhood*, 323 U.S. 210 (1944), a Railway Labor Act case, the Court predicated jurisdiction over a fair representation claim upon the predecessor of 28 U.S.C. § 1337. And in *Syres v. Oil Workers*, 350 U.S. 892 (1955), and *Ford Motor Co. v. Huffman, supra*, 345 U.S. at 332 n.4, cases under the NLRA, the Court found jurisdiction over fair representation claims based on *Tunstall* without mention of § 301.

Second, jurisdiction over some fair representation claims—those challenging the union's performance in negotiating or failing to negotiate a contract—cannot be predicated upon § 301 because such suits are not "for violation of contracts." *See* Pet. Br. at 13 n.5.

In all events it is clear that when § 301 was enacted the fair representation cause of action "had not yet [been] divined," *United Parcel Service v. Mitchell*, 451 U.S. 56, 76 (1981) (Stevens, J., dissenting). Respondents offer no evidence whatsoever to suggest that Congress in enacting § 301 contemplated that fair representation claims would be brought under the section. Consequently, in enacting § 301 Congress could not have formulated any intent as to the limitations period for fair representation claims. Thus, whatever the omission of a § 301 limitations period may signify for *other* types of § 301 actions, that omission signifies nothing about congressional intent with respect to fair representation claims. Respondents' major premise thus fails. *See also* Pet. Br. at 12-14.[3]

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[3] Respondents (Br. at 17-18) and respondent Anchor Motor in *Del Costello* (Br. at 16-17) contend that the Rules of Decision Act, 28 U.S.C. § 1652, bears on the choice of a limitations period for fair representation causes of action—exactly how, they do not say. Respondents do not appear to challenge our submission that the question of what limitations period applies to the fair representation cause of action turns on the proper construction of the statutes that give rise to that cause of action. (*See* Pet. Br. at 10-12). In any event, this Court has framed limitations questions for other federal causes of action (including certain § 301 actions, *see* Pet. Br. at 12 n.4) as questions of statutory construction, and, on that basis, the Court several times has decided not to apply a state statute of limitations to a federally-created right for which no express time limit was provided in the statute creating the right. *See Holmberg v. Ambrecht*, 327 U.S. 392 (1946); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1971). *See also Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1972) ("Although state law is our primary guide in this area it is not, to be sure, our exclusive guide"); *Chevron Oil Co. v. Huston*, 404 U.S. 97, 104 (1971).

The Court has proceeded in that fashion because the Rules of Decision Act requires resort to state laws only "in cases where they [state laws] apply," *viz.*, only in cases in which a state-created right is asserted. This follows from the Court's long-standing understanding of the Act as being "no more than a declaration of what the law would have been without it," *Hawkins*

2. We therefore return to the point of our opening brief: although Congress did not anticipate that the

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v. Barney's Lessee, 30 U.S. 457, 464 (1831); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 72 n.2 (1938), for absent the Rules of Decision Act there would be no requirement for a federal court to apply state law to the enforcement of federally-created rights. Furthermore, in *Erie* the Court concluded that "the purpose of the [Rules of Decision Act] was merely to make certain that in all matters except those in which some federal law is controlling, the federal courts *exercising their jurisdiction in diversity cases* would apply as their rules of decision the law of the State." 304 U.S. 72-73 (emphasis added). And post-*Erie*, this Court has not relied on the Rules of Decision Act in deciding *any* question involving the enforcement of a federally-created right. Indeed, in *Guaranty Trust Co. v. New York*, 326 U.S. 99 (1945), the Court, in holding that the Rules of Decision Act required application of a state statute of limitations in a *diversity* case, was careful to begin its analysis by "put[ting] to one side the considerations relevant in disposing of questions that arise when a federal court is adjudicated a claim based on federal law." *Id.* at 101. *See also Holmberg v. Ambrecht*, *supra*, 327 U.S. at 394, 395 (distinguishing *Guaranty Trust* in federal question case); *Angel v. Bullington*, 330 U.S. 183, 192 (1947); *Burks v. Lasker*, 441 U.S. 471, 476-77 (1979).

Of particular relevance here is the fact that in fair representation cases the Court has not found itself bound by state laws in answering questions on which Congress had not expressly spoken but has, instead, sought "to implement a remedial scheme that will best effectuate the purposes of the [National Labor Relations or Railway Labor] Act." *Electrical Workers v. Foust*, *supra*, 442 U.S. at 47; *see also id.* at 53 (Blackmun, J., concurring); *Bowen v. Postal Service*, —— U.S. ——, 51 U.S.L.W. 4051 (Jan. 11, 1983).

It has been suggested that the Rule of Decisions Act actually applies to *all* cases and that the Court's decision not to follow state law in various federal question cases was because the Act does not require the Courts to do so where "the . . . Acts of Congress otherwise require or provide." *See Robertson v. Wegman*, 436 U.S. 584, 597-98 (1978) (Blackmun, J., dissenting); Westen & Lehman, *Is There Life For Erie After the Death of Diversity*, 78 Mich. L. Rev. 311 (1980). We do not understand the Court to have adopted that view; certainly, the language and reasoning of the post-*Erie* decisions point the other way. In any event, even under this theory determining what limitations period applies here would turn on construing the federal statute that creates the right sued upon.

courts would imply a cause of action for breach of the duty of fair representation, Congress did decide in enacting § 10(b) that legal proceedings that threaten the smooth functioning of the consensual processes established by the NLRA must be instituted within six months. *See* Pet. Br. at 17-21. Respondents, while implicitly conceding this point, contend that it has no application to this fair representation suit. In their view, a fair representation claim challenging the union's performance in arbitration does not pose such a threat because "the consensual process of arbitration already has taken place" (Resp. Br. at 30). Respondents' argument cannot withstand analysis.

The grievance-arbitration process established by a collective bargaining agreement provides a means by which the parties to the agreement (with the aid of a neutral arbitrator) peacefully resolve their disputes and, in so doing, establish "the law of the shop," *United Parcel Service v. Mitchell*, *supra*, 451 U.S at 64. The fair representation cause of action, notwithstanding its important role in the collective bargaining system established by the NLRA, represents a challenge to a decision arrived at through the collective bargaining process—a decision that the parties to the process are prepared to live by. During the period in which fair representation claims may be filed challenging the union's performance in processing the arbitration case (or in resolving a grievance prior to arbitration), the parties cannot rely on the arbitrator's decision (or their own resolution) as final. Thus, fair representation claims, although not aimed at blocking the arbitration hearing (or grievance procedure) from taking place, nevertheless threaten the "smooth functioning" of the grievance-arbitration machinery as a system of dispute resolution. *See also* Pet. Br. at 15-17, 25-27. Indeed, it was for this very reason that the Court in *Mitchell* found the NLRA policy favoring the " 'relatively rapid disposition of labor disputes' " applicable, 451 U.S. at 63 (citing § 10(b)). The Court explained:

> This [grievance-arbitration] system . . . with its heavy emphasis on grievance, arbitration and the 'law of the shop' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement . . . could suddenly be called into question as much as six years later. [*Id.* at 64]

Our argument in this regard is strongly corroborated by the brief *amicus curiae* of the Chamber of Commerce of the United States in this case. Although the Chamber represents only employers and not unions, the Chamber has elected to file an *amicus curiae* brief here concerning the limitations period for fair representation claims against unions because, in the Chamber's words (Br. at 2), that issue is of "vital concern to the large number of Chamber members who are parties to collective bargaining agreements containing grievance and arbitration procedures." As the Chamber explains, a fair representation claim, if successful, "undercut[s] the precedential value of arbitration awards," and thus the potentiality that such a claim could be filed years after the arbitrator's award was rendered necessarily implicates "[t]he efficacy of a private-dispute resolution system." *Id.*; *see also id.* at 10-11; Brief for Respondent Anchor Motor Freight in *Del Costello* at 21-22.[4]

It follows, as Justice Stewart concluded in his separate opinion in *Mitchell*, that the balance Congress struck in § 10(b) is "precisely the balance at issue" in the fair representation context, 451 U.S. at 70, and Congress' aims are best effectuated by application of § 10(b) to fair representation claims.[5]

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[4] *See also* Br. for Respondent Teamsters Local 557 in *Del Costello* at 9-10. Ironically, the Chamber, Anchor Motor, and Local 557, after demonstrating that fair representation claims strongly implicate the congressional policy protecting the consensual processes of dispute resolution, all nonetheless seek to avoid application of § 10(b), the statute of limitations Congress fashioned to effectuate that policy, and urge instead adoption of shorter limitations periods borrowed from state law.

[5] Since the filing of our opening brief, the Court below in a hybrid § 301/breach of duty action against a union and an em-

Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), which respondents claim requires application of a state limitations period here, actually confirms our conclusion.[6] That was a suit alleging a breach of a collective agreement that did not contain any machinery for resolving such disputes; the Court held that the timeli-

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ployer recognized that § 10(b) "reflects a judgment by Congress in a closely analogous context—*i.e.*, unfair labor practice actions commenced under the NLRA—that six months represents a proper accommodation between the employee's right to be heard and the important national interest in industrial peace"; that application of § 10(b) "ensures that all labor disputes will be resolved expeditiously, thereby strengthening the 'stability of bargaining relationships' "; and that application of § 10(b) furthers "the strong 'national interest in uniformity in industrial relations,' particularly where the labor disputes implicates 'those consensual processes that federal labor law is chiefly designed to promote.' " *Assad v. Mount Sinai Hospital*, No. 82-7251 (2d Cir., March 9, 1983), slip op. at 11-12. Based on this reasoning, the court of appeals in *Assad* applied § 10(b) to the claim against the employer. But because the *Assad* panel concluded that the decision below in the instant case "represents the law of the Circuit and we must follow it," *id.* at 4, the panel applied the three-year malpractice statute of limitations to the claim against the union. Two of the three members of the *Assad* panel stated that but for the decision below in this case they "would be inclined to apply the section 10(b) limitations period against both the union and the employer on the basis that the reasons for adopting that period are more persuasive in fair representation actions," *id* at vi n.3; Judge Oakes, who also was a member of the two-judge panel that decided the instant case, disagreed.

[6] Respondents' reliance on *United Parcel Service v. Mitchell*, *supra*, to support application of state law is likewise misplaced. In *Mitchell*, the Court *assumed* without deciding that state law was appropriately borrowed because all the parties had so assumed both in this Court and below; the Court expressly reserved the question whether the § 10(b) limitations period should have been applied had it been raised. *See* 451 U.S. at 60 n.2; *see also id.* at 64 (*"Given the choices present here* . . . we think the District Court was correct when it chose the 90-day period imposed by New York for the bringing of an action to vacate an arbitration award") (emphasis added).

ness of the claim was to be determined by reference to a state limitations law.[7] But in reaching this conclusion the Court first noted that the limitations question was "clearly a federal question, for in § 301 suits the applicable law is 'federal law, which the courts must fashion from the policy of our national labor laws.'" *Id.* at 701. And, in concluding that for the case before it Congress had intended that that federal question be answered by looking to state law, the Court reasoned that although "the subject matter of § 301 is 'peculiarly one that calls for uniform law[,]' [o]ur cases have defined the need for uniformity . . . in terms that are largely inapplicable here." *Id.* The Court explained:

> The need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy. [*Id.* at 702]

The Court added this caution:

> The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement.

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[7] The plaintiff-union in *Hoosier Cardinal* had urged adoption of a uniform limitations period for a "suit for damages caused by breach of a collective agreement" and suggested that a six-year period was appropriate as six years was "the median period on contract actions in the states" and was "the standard which Congress has approved for contract suits in the Court of Claims" (Br. for Pet. at 18). Contrary to respondents' repeated assertions in their brief in this case (at 5, 19, 29), the union in *Hoosier Cardinal* did *not* rely on the § 10(b) limitations period.

> Such an action closely resembles an action for breach of contract cognizable at common law. *Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide,* and we indicate no view whatsoever on that question. [*Id.* at 705 n.7; emphasis added]

Hoosier Cardinal thus does not hold, as respondents seem to believe, that Congress intended local limitations to apply to *all* suits brought under § 301 (*see* Resp. Br. at 18-19, 30-31). Rather, all that the decision holds is that Congress intended application of state limitations periods with respect to those § 301 claims that "closely resemble[] an action for breach of contract cognizable at common law" and thus do not "threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote." And by drawing this distinction, *Hoosier Cardinal* suggests that with respect to fair representation claims—which, as we have shown, *do* implicate the smooth functioning of the consensual processes—Congress' policies would best be effectuated by applying a uniform limitations period. The congressional desire for uniformity provides yet additional proof that § 10(b) is the proper source for determining the limitations period for the fair representation cause of action.

3. Respondents cite a number of other statutory provisions—none of which they suggest is the source of the duty of fair representation—in an attempt to buttress their argument that application of state law to the judicial cause of action for breach of the duty of fair representation best accords with Congress' intent (Resp. Br. at 20-28). As we show in the margin, these other provisions shed no light on the issue presented here.[8]

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[8] Respondents rely on the following provisions:

(a) *LMRA §§ 302 and 303*—Respondents argue that in enacting the LMRA, Congress "drew a clear line of legislative demarcation between amendments to the National Labor Relations Act . . . and

II. THE STATE LAW ISSUE

1. If the Court were to conclude that *state* statutes of limitation apply to fair representation claims, the Court would then have to decide which state limitations period

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§ 301 and its contiguous provisions, §§ 302 and 303 . . . plac[ing] them in separate titles" (Resp. Br. at 20). Respondents assert that Congress intended local limitations to apply to §§ 302 and 303, and view that decision as somehow revelant to understanding Congress' intent with respect to fair representation actions.

The premise of respondents' argument—that state limitations periods apply under §§ 302 and 303—is by no means obvious; there are strong arguments for concluding that a uniform limitations period was intended for the uniquely labor-law causes of action created by §§ 302 and 303. This Court has never decided the question with respect to either section. (In *Mine Workers v. Railing*, 401 U.S. 486 (1971), on which respondents rely with respect to § 303, the Court summarily vacated an appellate court decision as to when a § 303 cause of action accrues and remanded that decision to the court of appeals for reconsideration in light of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), an antitrust case; the Court did not consider in *Railing* any question as to the limitations period for a § 303 claim as no such question was raised by any party.) But it is not necessary to decide the § 302 and § 303 limitations questions in this case because even if Congress did intend state limitations periods to apply under those sections, that intention would not be relevant here for two reasons.

First, to the extent that Congress drew the "clear line" respondents suggest, the fair representation cause of action falls on the NLRA side of the line and not the Title III side; the fair representation duty was created by the NLRA and the judicial cause of action was implied to enforce that NLRA duty. *See* pp. 1-2, *supra*.

Second, in any event, the "line" on which respondents rely is of no analytical significance to this case. Congress' treatment of §§ 302 and 303 (and of the other provisions of Title III of the LMRA, §§ 304 and 305, which have since been repealed) says nothing about Congress' intent with respect to the limitations period for fair representation claims. Those sections involve causes of action *unrelated* to the fair representation cause of action or to each other; they were grouped together in a single title of miscellaneous provisions with no common thread. The fact that they are "contiguous" to § 301 hardly indicates either that Congress thought of the limitations issue for fair representations actions in enacting § 301 or

should be borrowed. In their brief respondents concede as they must in light of this Court's decisions that "an element of proof in a breach of the duty of fair representa-

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that Congress would have applied state law had it thought of the issue.

Respondents argue (Br. at 21) that the treatment of § 303 is "especially instructive . . . because it in terms provides for a suit against the union on a claim which can be established only by reference to an unfair labor practice." But unlike fair representation suits, the cause of action for "damages . . . sustained" by a secondary boycott—which is the only cause of action authorized by § 303—does not threaten the smooth functioning of the NLRA's consensual process; to the contrary, such suits can be brought only when the consensual processes "have already broken down," *Hoosier Cardinal, supra*, 383 U.S. at 702. Thus, the absence of an express limitations period for § 303 actions is not probative of Congress' intent with respect to the limitations period for fair representation actions. Indeed, it is far more significant that Congress subjected the filing of unfair labor practices charges under § 8(b)(4), seeking injunctions against secondary boycotts, to the § 10(b) limitations period. Unlike damages, injunctions intrude on the economic weapons contributing to the reaching of an agreement and thus—like fair representation actions—§ 8(b)(4) injunction proceedings implicate the functioning of the consensual processes.

(b) *Labor-Management Reporting and Disclosure Act ("LMRDA")*—Respondents' reliance on Title I of the LMRDA is doubly flawed. First, the Court's task here is to construe the Wagner Act and the LMRA; the LMRDA was enacted by a different Congress years later and thus is not authoritative. *See Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977).

Second, Title I of the LMRDA regulates "the conduct of internal union affairs," *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193 (1967); the duty of fair representation, in contrast, regulates a union's conduct in representing bargaining unit members vis-a-vis the employer. To be sure, both types of regulation grew out of the fact that "the national labor policy vested unions with power to order the relations of employees with their employer," *id.* at 181, but the two types of claims implicate very different interests. In particular, as shown above (pp. 5-6 *supra*), fair representation claims implicate that aspect of the national labor policy that seeks to secure industrial peace through the functioning of consensual processes for resolving disputes between unions and employers; Title I claims,

tion case is . . . that the employer breached the contract" (Resp. Br. at 12-13). Respondents also concede that the thrust of their claim is that there was a "breaking down or malfunctioning of the process of . . . arbitration" (Resp. Br. at 30). Yet respondents nonetheless contend that the arbitration statute is not appropriately borrowed because "[t]he conduct to be tried in this case against the union is breach of the duty of fair representation at the arbitration hearing," and the propriety of the Union's conduct "was not before the arbitrator" (Resp. Br. at 15; *see also* Resp. Br. at 14). Respondents' argument is trebly flawed.

First, respondents' argument is contrary to the reasoning of *United Parcel Service v. Mitchell, supra.* That case

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because they involve only internal union matters, do not directly implicate this interest. This Court so recognized in *Clayton v. Automobile Workers*, 451 U.S. 679, 688 (1981), when it concluded that "an alleged breach of the union's duty of fair representation . . . raises issues rooted in statutory policies extending far beyond internal union interests," and that therefore considerations that were relevant to LMRDA litigation—specifically "the policy of forestalling judicial interference with internal union affairs," *id.* at 687—were not applicable to fair representation litigation. *See also Electrical Workers v. Foust, supra*, 442 U.S. at 47 n.9 (reserving question of award of punitive damages under LMRDA).

(c) *Postal Reorganization Act* ("PRA")—Like the LMRDA, the PRA was enacted years after the LMRA and for that reason alone is of little relevance here. In any event, the PRA makes the NLRA applicable to labor relations in the Postal Service, 39 U.S.C. § 1209(a); thus, it is the *NLRA* duty of fair representation, and the *NLRA* cause of action for breach of that duty that applies to postal service unions, and not a special duty or special cause of action created by the PRA. Moreover, although the PRA contains, in § 1208(b), its own version of § 301, the fair inference from the omission of a limitations period in that section is not that Congress elected to apply state law to actions under § 1208(b) but that Congress intended whatever limitations period applies under § 301 to apply to the analogous claims under § 1208(b). To rely on the PRA as evidence of congressional intent here, therefore, is sheer bootstrapping.

involved a § 301 claim against an employer. The "indispensable predicate" for that claim was "a demonstration that the union breached its duty of fair representation." 451 U.S. at 62. That predicate issue had not been an issue "before the arbitrator." But the Court did not view this fact as rendering the arbitration statute of limitations inapplicable; to the contrary, it was precisely *because* plaintiff was required to prove a breach of duty by the union that the *Mitchell* Court concluded that the arbitration statute was applicable. In the Court's words:

> Since the conclusion of the Joint Panel was, under the collective-bargaining agreement, 'binding on all parties,' respondent was required in some way to show that the Union's duty to represent him fairly at the arbitration had been breached before he was entitled to reach the merits of his contract claim. *This*, in our view, makes the suit more analogous to an action to vacate an arbitration award than to a straight contract action. [451 U.S. at 62; emphasis added. *See also* Pet. Br. at 27-29.]

Second, the New York statute of limitations for actions to vacate arbitration awards applies in terms to suits in which the "conduct to be tried"—for example, "partiality," "corruption," "fraud," or other acts of "misconduct in procuring the award"—was not an issue "before the arbitrator."[9] The arbitration statute of limitation applies to such suits not because the issues are the same as those decided by the arbitrator, but because if the plaintiff prevails on such issues the *effect* would be to invalidate the arbitrator's decision. And as this Court has held, the same is true of proof of a breach of the duty of fair representation: such proof "undermines the integrity of

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[9] N.Y. Civil Practice Law & Rules § 7511(b)(1)(i), (ii). Federal courts vacate arbitration awards on these same grounds in § 301 actions by unions or employers seeking that relief. *See* R. Gorman, *Labor Law Text* 599-600 (1976).

the arbitral process" and thereby "removes the bar of the finality provisions of the contract." *Hines v. Anchor Motor Freight, Inc., supra,* 424 U.S. at 567. *See also* Pet. Br. at 26-27.

Third, in any event, respondents ignore their own concession that, under this Court's decisions (cited in Pet. Br. at 26), a necessary element in their fair representation claim is proof of the employer's breach of contract. Thus, the "conduct to be tried" in the fair representation case is not merely the union's conduct but also the employer's. And the employer's conduct *was* the subject of the arbitration proceeding and the arbitrator's decision. *See also* Pet. Br. at 25-26.

For all these reasons, respondents' attempt to defeat application of the arbitration statute on the ground that the "conduct to be tried" in this case was not an issue "before the arbitrator" must fail.[10]

2. Respondents devote much of their brief to constructing an analogy between fair representation actions and malpractice actions (Resp. Br. at 6-14). But Respondents' argument, even if it were valid (and we show in a moment it is not), would establish only that there are two possible analogies here, one (the malpractice analogy) based upon the supposed similarities between the duties of an attorney and a union and the other (the arbitration analogy) based upon the effect that a judgment for plaintiff would have on the arbitral process. In *Mitchell* the Court also was presented with two

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[10] Respondents also argue against the arbitration statute on the ground that the remedy available in a fair representation suit may differ from the remedy available in arbitration (Resp. Br. at 14). Respondents' argument misses the critical point: regardless of the particular relief the employee obtains, the *effect* of a judgment in his favor in a fair representation suit is necessarily to undermine the validity of the arbitrator's decision. This makes the arbitration statute applicable.

analogies, one to traditional contract actions and the other to actions to vacate arbitration awards. The *Mitchell* court concluded in light of "the federal policies involved," 451 U.S. at 61—specifically the policy favoring the " 'relatively rapid disposition of labor disputes,' " *id.*, and disfavoring "the results of the . . . arbitral process being suspended in limbo for long periods," *id.* at 64—that, "as a matter of federal law," the arbitration statute of limitations provided the more "appropriate" limitations period for the claim against the employer, *id.* at 60. Similarly, here, even assuming *arguendo* the validity of respondents' malpractice analogy, the same federal policies would counsel adoption of the arbitration statute of limitations as the more appropriate analogy.

But, in any event, even on its own terms respondents' analogy cannot withstand analysis, for respondents make the mistake of attempting to apply "traditional common law principles," *Bowen v. Postal Service*, *supra*, —— U.S. at ——, 51 U.S.L.W. at 4053, to the relationship between an exclusive bargaining representative and those it represents even though that relationship is "a creature of 'labor law,' " *Mitchell*, *supra*, 451 U.S. at 63, and is embedded in a system of regulation of the rights and duties of employers, unions and employees. When the relevant labor-law principles are taken into account, the attempted malpractice analogy crumbles.

To begin with, unlike the duty imposed on an attorney, the duty of fair representation does *not* rest on the theory that union officers are "professional[s]" who possess "the special knowledge and capacities which an attorney brings to legal issues" (Resp. Br. at 10-11). Union stewards and grievance representatives for the most part are rank-and-file workers who have been elected by their fellows to their posts; as the courts of appeals have recognized, "[i]t would not be realistic to try to hold them to the

same standards as lawyers." [11] Indeed the duty of fair representation is not a personal duty imposed on union representatives individually [12] but is imposed on the union as an entity as a corollary of the provisions of the "[n]ational labor policy . . . [which] extinguish[] the individual employee's power to order his own relations with his employer and create[] a power vested in the chosen representative to act in the interests of all employees," *NLRB v. Allis-Chalmers*, *supra*, 388 U.S. at 180-81. *See also* p. 1 & n.1, *supra*.

As representative of all employees in a collective bargaining unit, the union is placed in a very different posi-

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[11] *Graf. v. Elgin, Joliet & Eastern Ry. Co.*, 697 F.2d 771, 779 (7th Cir. 1983); *see also Freeman v. O'Neal Steel Inc.*, 609 F.2d 1123, 1127 (5th Cir. 1980), *cert. denied*, 449 U.S. 833; *Curtus v. United Transportation Union*, 112 L.R.R.M. 2864, 2865 (8th Cir. 1983); *Findley v. Jones Motor Freight*, 639 F.2d 953, 958 (3rd Cir. 1981). In part for this reason, the courts of appeals are unanimous in holding that the tort-law duty of "due care"—the duty an attorney owes to his clients—"has not been made a part of the union's duty." *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 284 (1st Cir. 1970), *cert. denied*, 400 U.S. 877. Cases so holding from seven circuits are collected in *Harris v. Schwerman Trucking Co.*, 668 F.2d 1204, 1206-07 (11th Cir. 1982).

[12] *See, e.g., Williams v. Pacific Maritime Ass'n*, 421 F.2d 1287, 1289 (9th Cir. 1970); *Ramsey v. Signal Delivery Service Inc.*, 631 F.2d 1210, 1212 (5th Cir. 1980); *Spielman v. Anchor Motor Freight Inc.*, 551 F. Supp. 817, 820 n.2 (S.D.N.Y. 1982); *Balestreri v. Western Carloading*, 530 F. Supp. 825, 831 (N.D. Cal. 1980); *Suwanchi v. Electrical Workers*, 528 F. Supp. 851, 861-62 (D.N.H. 1981); *Hetrick v. Aluminum Workers Union*, 478 F. Supp. 17 (E.D. Pa. 1979); *Pedro v. Teamsters Local 490*, 509 F. Supp. 83 (N.D. Cal. 1981); *Ransdell v. Machinists*, 443 F. Supp. 936, 940 (E.D. Wis. 1978); *Mims v. Capitol Printing Ink Co.*, 428 F. Supp. 12, 14 (D.D.C. 1976); *Henry v. Radio Station KSAN*, 374 F. Supp. 260, 267 (N.D. Cal. 1974); *Hall v. Pacific Maritime Ass'n*, 281 F. Supp. 54, 61 (N.D. Cal. 1968); *Larry v. Penn Truck Aids Inc.*, 94 F.R.D. 708, 710 (E.D. Pa. 1982). *See generally Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962).

tion from an attorney representing a client, and owes a very different duty. Unions represent bargaining units in which "[c]onflict between employees represented . . . is a recurring fact," *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964), and the union "must be free" to take a "good faith position contrary to that of some individuals whom it represents," *id.* at 349. Thus, a union, unlike an attorney, does not owe a duty of undivided loyalty to each worker it represents; rather, the union's duty is simply to refrain from actions that are "arbitrary, discriminatory or in bad faith," *Vaca v. Sipes*, *supra*, 386 U.S. at 190. The fair representation doctrine "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971).

The differences between the attorney-client and union-employee relationships are highlighted by contrasting the role of attorneys in litigation with the role of unions in arbitration proceedings. In a lawsuit, of course, the client is the party and the attorney his advocate; the attorney's duty is, within the confines of the canons of ethics, to advocate precisely what his client asks. In arbitration, in contrast, the union is itself the party and the employee/grievant has no formal role in the process. And the union, as always, represents the bargaining unit as a whole and not just the individual grievant: "In arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974); *see also Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981).[13]

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[13] Respondents' efforts (Br. at 11) to analogize the role of the union to the role of an attorney representing a class in a class action is misplaced. A prerequisite to a class action is adequate representation. *Hansberry v. Lee*, 311 U.S. 32 (1940). "The adequate rep-

Thus, the union stands in a very different position *vis-a-vis* the represented employees than does an attorney *vis-a-vis* his clients, and the duty a union owes to members of the bargaining unit is quite different from the duty an attorney owes to a client. For these reasons alone, the malpractice analogy respondents propound is strained. But there is an even more fundamental flaw in that analogy which makes it especially inappropriate to transport it into the labor relations context: the malpractice statute of limitations does not take into account the interests of *other* parties that are uniquely implicated by fair representation claims.

A malpractice action is, as respondents correctly note, a private dispute between the attorney and his former client (Resp. Br. at 13); a determination that the attorney failed properly to assert the client's right as against some third party will not affect the rights of the third party for those rights have been finally determined. Consequently, the limitations period for such a suit implicates only the competing interests of the attorney and the client. The fair representation duty, in contrast, is an integral part of a system for regulating relationships between employees, unions and employers, and a fair representation suit has ramifications that extend beyond the immediate parties to the suit because such a suit, if successful, would undermine the validity of an arbitrator's decision establishing the "law of the shop" (pp. 5-6 *supra*). Thus, the limitations period for fair representation actions implicates interests of the employer, his other employees and the public at large, because that limitation period will determine the period of time during which the law of the shop will be unsettled. Accord-

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resentation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class." *General Telephone Co. v. EEOC*, 446 U.S. 318, 331 (1980); *see also East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 405 (1977).

ingly, the malpractice analogy, which does not take into account these interests, is not an appropriate one—and at the least is less appropriate than the arbitration analogy—in choosing a state limitations period.[14]

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[14] In *Del Costello* the parties in their briefs have addressed at length a variety of retroactivity issues with respect to this Court's *Mitchell* decision. Whatever the resolution of those issues, they cannot affect the outcome of *this* case for two reasons.

First, as all parties agree, this case (and *Del Costello*) present to the Court for the first time the question of the limitations period applicable to the claim against the *union* in a hybrid § 301/breach-of-duty suit. It is well-established that even a rule that is to be given wholly prospective application nonetheless is applied to the case in which the rule is announced; this is done to avoid the Article III problems that otherwise would be presented. *See, e.g., Stovall v. Denno*, 388 U.S. 293, 301 (1967); *Desist v. United States*, 394 U.S. 244, 254-55 n.24 (1969).

Second, even if there were no Article III impediment to withholding application of the rule to be announced in this case to the claims in this case, there would be no justification for that course. At the time that respondents' cause of action arose and at the time that suit was filed, the rule in the Western District of New York (in which all events at issue here took place and in which the suit was filed) was that the applicable statute of limitations was New York's 90-day limitations period for actions to vacate arbitration awards. *Barbarino v. Anchor Motor Freight, Inc.*, 421 F. Supp. 1003 (W.D.N.Y. 1976). Thus, respondents could not properly have "relied" on an expectation that a longer limitations period would be applicable in waiting eleven months before filing this action. That no doubt explains why respondents have never asserted a right to nonretroactivity, and why the court below, without any objection from respondents, applied *Mitchell* retroactively to respondents' claim against the Company.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court below should be reversed.

Respectfully submitted,

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MOTION FILED
FEB 14 1983

No. 81-2408

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STEELWORKERS, LOCAL 2602 - - Petitioner

versus

DONALD C. FLOWERS

and

KING E. JONES - - - - - Respondents

On Appeal From the Second Circuit Court of Appeals

BRIEF OF AMICUS CURIAE

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PRELIMINARY MATTER

QUESTIONS PRESENTED

Should the Supreme Court ruling in U.A.W. v. Hoosier Cardinal Corp. 383 U. S. 696 (1966) that the applicable state statute of limitations be applied to suits brought under Section 301 of the Labor Management Relations Act or should that ruling be abandoned and the more restrictive six month limitation period of Section 10(b) of the National Labor Relations Act be applied to suits brought under Section 301 L.M.R.A.?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 81-2408

STEELWORKERS, LOCAL 2602 - - - *Petitioner*

v.

DONALD C. FLOWERS

and

KING E. JONES - - - - - *Respondents*

On Appeal From the Second Circuit Court of Appeals

BRIEF OF AMICUS CURIAE

INTEREST OF GORDON L. HIGGINS

Gordon L. Higgins is plaintiff in a lawsuit brought under Section 301 of the Labor Management Relations Act against Claremont Transfer Company and Teamsters Local Number #89. Higgins lawsuit was brought approximately two years after his wrongful termination by Claremont Transfer Company. Through a myriad of summary judgment motions, defendants have alleged that Higgins did not comply with the applicable statute of limitations for filing a lawsuit under section 301 of the Labor Management Relations Act. In one of these motions for summary judgment,

defendants were successful in reliance upon the Sixth Circuit Court of Appeals decision in *Badon et al.* v. *G.M.C.,* 679 F. 2d 93 (6th Cir., No. 80-1730, May 25, 1982) wherein the Circuit Court decided that the six month limitations period for filing a charge under the National Labor Relations Act should apply rather than the applicable state statute.

The District Court subsequently set aside the summary judgment entered agianst Plaintiff Higgins at least partially in reliance upon *Gray* v. *International Association of Heat and Frost Insulators and Asbestos Workers Local No. 51,* 416 F. 2d 313 (6th Cir., 1969) in which the Sixth Circuit Court of Appeals ruled that the applicable statutes of limitations to be applied to LMRA Section 301 suits in Kentucky is the five year statute of limitations contained in Kentucky Revised Statute (KRS) 413.120(2) which defines the statute of limitations in actions based upon liabilities created by statute.

The statute of limitations in Section 301 lawsuits is of critical importance in Higgins case.

Higgins accordingly has a vital interest in the statute of limitations in suits brought under Section 301 of the Labor Management Relations Act. A decision limiting the limitations period for bringing a suit under Section 301 of the L.M.R.A. may foreclose to Higgins litigation in the Courts of the Sixth Circuit. Appellant and Appellee have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The decision below raises issues of great importance. In this brief we attempt to show that the decisions of the lower courts applying the sixth month limitations period for filing a charge under the National Labor Relations Act to suits brought under Section 301 of the Labor Management Relations Act is contrary to the decision of the Supreme Court in *U.A.W.* v. *Hoosier Cardinal Corp.,* 383 U. S. 696 (1966) which says that the applicable state statute of limitations should apply. The Congress of the United States and the legislatives of each of the fifty states have had ample opportunity to legislate a limitations period for filing suit under Section 301 of the LMRA since 1967 if they were unhappy with the ruling of the Supreme Court or with the limitations periods as determined by the courts. They have not done so.

The limitations period as defined in *U.A.W.* v. *Hoosier Cardinal Corp., supra,* allows each state to temper the limitations period to the labor climate within that state.

In any event, the six month limitations period allowed by the National Labor Relations Act for the filing of charges under that act is too short to be applied to suits brought under Section 301 of the Labor Management Relations Act where the question is the filing of a charge under the National Labor Relations Act, the infraction is normally definite. In a Section 301 L.M.R.A. case, on the other hand, in many if not most instances the employee may not learn of any improper

representation of his case until months after the hearing. During the period of termination both the company and the union may make promises to the employee that he will be rehired, thereby passifying the terminated employee until after his statute of limitations period has run if the six month statute of limitations period is allowed to stand.

Finally, rights under Section 301 of the Labor Management Relations Act are not as well known as are rights under the National Labor Relations Act or the Civil Rights Act of 1964. After the employee learns he has been damaged it may take him some time to learn what his rights under the law are.

The Second Circuit Court of Appeals in *Flowers* v. *Steelworkers, 2602* correctly applied prior judicial decisions and properly applied the correct state statute of limitations to the action against the union when it applied the three year limitation period for new medical malpractice.

ARGUMENT

The decision of the Supreme Court in *U.A.W.* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966) is clear, concise and sound and precludes the application of the 6 month limitations period of 10(b) of the National Labor Relations Act to Section 301 L.M.R.A. suit.

In 1966 the Supreme Court ruled in *U.A.W.* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966) that the appropriate limitations period for the filing of a lawsuit under Section 301 of the Labor Management Rela-

tions Act should be the appropriate state statute of limitations. The Court in ruling on that case said:

> "That Congress did not provide a uniform limitations period for Section 301 suits is not an argument for judicially creating one, unless we ignore the context of this legislative omission. It is clear that Congress gave attention to limitations problems in the Labor Management Relations Act, 1947; it enacted a six months' provision to govern unfair labor practice proceedings, 61 Stat. 146, 29 U.S.C. § 160(b) (1964 ed.) and it did so only after appreciable controversy. In this context and against the background of the relationship between Congress and the Courts on the question of limitations provisions it cannot be fairly inferred that when Congress left § 301 without a uniform time limitation, it did so on the expectation that the Courts would invent one. As early as 1830 this Court held that state statutes of limitations govern the timeliness of federal courses of action unless Congress has specifically provided otherwise. *U.A.W.* v. *Hoosier Cardinal Corp., supra* at 703, 704."

Subsequently the Sixth Circuit Court of Appeals ruled in *Gray* v. *International Association of Heat and Frost Insulators and Asbestos Workers Local No. 51,* 416 F. 2d 313 (1969) that the statute of limitations to be applied to L.M.R.A. § 301 suits in Kentucky is the five year statute of limitations contained in KRS 413.120(2). The Court therein stated:

> "Finally we agree with the District Judge that since the Labor Management Relations Act provides no specific period of limitation for the insti-

> tution of unfair representation actions, timeliness should be determined by reference to the appropriate state limitation on similar suits . . . Accordingly we hold that he correctly concluded that the five year Kentucky limitation in actions based upon liabilities created by statute is applicable to the claim that Local 51 breached its statutory duty of fair representation . . ." (KRS § 413.120(2)).

The Gray decision clearly followed the ruling of the Supreme Court as set forth in *U.A.W.* v. *Hoosier Cardinal Corp., supra,* set forth above.

Other Federal Courts both at the district and appellate level have arrived at and developed the statutes of limitations in § 301 suits based upon the applicable state statute of limitations.

In *United Parcel Service Inc.* v. *Mitchell,* 451 U. S. 56 (1981), the United States Supreme Court addressed the question of the appropriate statute of limitations to apply in a § 301 suit brought by a discharged employee against his former employer and labor union alleging that his discharge was in violation of the labor agreement between the employer and the union. In that case, the court determined that the action was banned by a state statute of limitations governing suits to set aside arbitration awards, rather than the breach of contract limitation period.

The court said therein, affirming *Auto Workers* v. *Hoosier Cardinal Corp., supra:*

> "Congress has not enacted a statute of limitations governing actions brought pursuant to § 301 of the L.M.R.A. As the court pointed out in Auto

> Workers v. Hoosier Cardinal Corp., 383 U. S. 696, 704-705, 86 S. Ct. 1107 (1966), 'The timeliness of a § 301 suit . . . is to be determined, as a matter of Federal Law, by reference to the appropriate state statute of limitations . . .' "

The Seventh Circuit Court of Appeals in *Davidson* v. *Roadway Express, Inc.*, 650 F. 2d 902 (1981) overruled an Indiana Federal District Court which had applied the state's six year limitation period and ruled that the appropriate statute of limitation was that set forth in Indiana Code § 34-4-3-13 (1976), which provides for a 90 day period in which to set aside an arbitration award, adopting the rationale of Mitchell and specifically rejecting the application of the six month limitation period for appealing an arbitration decision as set forth in Section 10(b) of the National Labor Relations Act.

Other Federal Courts have rejected the application of Section 10(b) of the National Labor Relations Act while applying state arbitration act limitations to § 301 suits. *Scott* v. *Chrysler Corporation* (1982) 4 Lab L. Rep. 19, 797 (CCH) (E. D. Mich. 1981); *Kikos* v. *Teamsters*, 526 F. Supp. 110 (E. D. Mich. 1981); *Rigby* v. *Roadway Express Company, Inc.*, [1982] 4 Lab. L. Rep. 19, 995 (CCH) (S. D. Miss., 1981); *McQuay* v. *Bethlehem Steel Corporation* [1982] 4 Lab. L. Rep. 19, 815 (CCH) (D.C. Md. October, 1981). *Bigbie* v. *Teamsters*, 530 F. Supp. 402 (N. D. Ill. 1982).

All of these cases apply a state statute of limitations and reject the use of the limitations period of 10(b) of the National Labor Relations Act to § 301 suits.

In the case of *Flowers* v. *Steelworkers, Local 2602* the court determined that the applicable state statute of limitations applied to § 301 case rather than applying 10(b) of the National Labor Relations Act.

The court in *Flowers,* correctly determined that this action against the union is derived from a different duty than is the action against the company. The action against the company comes through the collective bargaining agreement while the duty of the union to represent the individual is as the court correctly interprets very similar to a malpractice action. Claims against the Union are not subject to prior arbitration and therefore as ruled by the Second Circuit, statutes of limitations for the appeal of arbitration awards should not be applied to suit against labor unions.

The Sixth Circuit Court of Appeals, has seen fit to abandon the ruling in *U.A.W.* v. *Hoosier Cardinal Corp.* and *Mitchell* and forged its own rule in *Badon* v. *General Motors Corporation,* 679 F. 2d 93, No. 80-1730 (6th Cir. May 25, 1982). There the Court stated that when a state statute of limitations for appealing arbitration decisions does not exist, then the statute of limitations of 10(b) of the National Labor Relations Act applies:

> "In summary, we are left without guidance by the state of Michigan with respect to the time period within which actions to vacate labor arbitration awards must be brought. We must therefore de-

> cide this federal question on the strength of our own reasoning. That process leads us to conclude that the most appropriate statute of limitations under these circumstances is the six month period found at section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b). Although that period specifically governs unfair labor charges brought before the National Labor Relations Board, the policy behind that same period applies with equal force when similar charges are brought to a federal court under section 301 of the L.M.R.A. . . ."

The Sixth Circuit Court of Appeals completely misinterpreted the Hoosier Cardinal Corp. decision and the Mitchell decision.

Under the two decisions, the statute of limitations in a § 301 case is the most appropriate statute of limitations. Under Mitchell, if a state arbitration statute with a limitations period exists, that statute of limitations period is applicable to L.M.R.A. § 301 suits. However, if no state arbitration statute with a limitations period exists, the courts must look to find the appropriate state statute of limitations. It is not appropriate for the Court to use 10(b) of the National Labor Relations Act when an appropriation state statute governing the time limitation for filing a law suit based upon a written or oral contract is in existence. Likewise, decisions which apply the 30-day limitation period of the Federal Arbitration Act, 9 U.S.C. 12 (1976), such as *Service Employees, Local No. 36* v. *Office Services Center, Inc.*, 670 F. 2d 404 (3rd Cir. 1982) must be overruled. Again, under

Hoosier Cardinal Corp. the courts must look to the applicable state statute of limitations.

Again, even if the thirty day limitation period of 9 U.S.C. 12 did apply to § 301 L.M.R.A. suits, it would apply only to suits against the employer for breach of contract and not to suits against labor unions for improper representation.

The Congress of the United States and the Legislatures of the fifty states have had seventeen years to establish a limitations period for § 301 L.M.R.A. suits if they were unhappy with the ruling in Hoosier Cardinal Corp. It is unnecessary for the court to overrule its decision in this case.

Further, the six month statute of limitations period allowed by the National Labor Relations Act for the filing of charges under the act is too short to be applied to suits brought against labor unions under § 301 of the Labor Management Relations Act. In charges brought under the National Labor Relations Act, the date and time of the infraction is normally definite. However, in a L.M.R.A. § 301 case, the employee may not learn of any improper conduct on the part of the union in handling his claim for several months or longer. Oftentimes infractions by the Union and the Company in § 301 L.M.R.A. cases involve clandestine meetings between the company and the union, they may involve grievance tradeoffs that are not immediately apparent to the employee. Oftentimes in cases involving discharge the union and the company may promise the discharged employee reinstatement at a future date or employment at another company. Generally the

employee does not realize he has been wronged until these promises have been continually broken.

The notice of § 301 L.M.R.A. suits makes them difficult to investigate. Using a very short statute of limitations as that of 10(b) of the National Labor Relations Act could result in the courts being clogged with § 301 L.M.R.A. suits, many of which could have been resolved or may never have been filed had time been allowed for careful investigation.

Finally, rights under such statutes as the Civil Rights Act of 1964 and the National Labor Relations Act are much better understood and responsibilities under those statutes are much better understood than are rights and responsibilities under § 301 of the Labor Management Relations Act. Employees upon dicharge may as a matter of cause file charges with the National Labor Relations Board and the Equal Employment Opportunity Commission. Charges filed with these agencies can be filed by the average individual without the aid of an attorney. Suits brought under § 301 of the Labor Management Relations Act require the preparation and filing of pleadings in Federal Court. The initiation of this type of proceeding is not well known to the average person and normally involves the retaining of an attorney by the individual and normally the payment of a retainer or hourly fee to the attorney. The competent attorney then wishes to investigate the case before filing a lawsuit. All of this could be seriously hampered by an overly restrictive statute of limitations as that of 10(b) of the National Labor Relations Act.

In many instances, the employee may not even contact an attorney until after the National Labor Relations Board has rejected his claim. If the statute of limitations of 10(b) of the National Labor Relations Act is applied to suits under § 301 L.M.R.A. the statute of limitations on the employee's claim may have run before the N.L.R.B. has rejected his claim and he has contacted an attorney to determine what other rights he may have. Whenever a specific act is silent as to time limitation, the applicable state statute of limitations has always applied.

CONCLUSION

In the interest of justice it is critical that the Court continue applying the appropriate state statute of limitations as defined by the Court in *U.A.W.* v. *Hoosier Cardinal Corp., supra,* to § 301 L.M.R.A. suits. Where a state artbitration statute with an appropriate limitation period exists it may be applied to § 301 L.M.R.A. suits. However, where a state arbitration statute with an applicable limitation period is silent, the courts should continue to apply the appropriate state statute rather than § 10(b) of the National Labor Relations Act to § 301 L.M.R.A. suits. The court in *Flowers* v. *Steelworkers, Local 2602* correctly applied the New York statutes for nonmedical malpractice to the L.M.R.A. § 301 not against the labor union. It has been seventeen years since the ruling in *U.A.W.* v. *Hoosier Cardinal Corp., supra* and in that time the Congress of the United States and the legislatures of the individual states have had ample opportunity to

establish limitations period if they were unhappy with the ruling of the Court.

Respectfully submitted,

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CERTIFICATE

It is hereby certified that a copy of the attached was mailed this 28th day of February, 1983 to the Hon. Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543 and to Hon. Robert M. Weinberg and Hon. David M. Silberman, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036.

Michael L. Boylan

No. 81-2408-CFX
Status: GRANTED

Docketed:
July 1, 1982

Vide:
81-2386

Title: United Steelworkers of America, AFL-CIO-CLC, et al., Petitioners
v.
Donald C. Flowers and King E. Jones

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Gottesman, Michael H.

Counsel for respondent: Flowers, Donald, Jones, King, Zinman, William H., Groner, Isaac N.

Entry	Date	Note	Proceedings and Orders
1	Apr 20 1982		Application for extension of time to file petition and order granting same until June 1, 1982 (Marshall, April 21, 1982).
2	May 20 1982		Application for further extension of time to file petition and order granting same until July 1, 1982 (Marshall, May 20, 1982).
3	Jul 1 1982	G	Petition for writ of certiorari filed.
4	Aug 4 1982		DISTRIBUTED. September 27, 1982
5	Aug 11 1982	P	Response requested. (Due September 10, 1982 - NONE RECEIVED)
7	Sep 9 1982		Order extending time to file response to petition until October 11, 1982.
8	Oct 27 1982		DISTRIBUTED. November 12, 1982
10	Nov 19 1982		REDISTRIBUTED. November 24, 1982
11	Nov 29 1982		Petition GRANTED. The case is consolidated with 81-2386 and a total of one hour is allotted for oral argument. **********
12	Dec 6 1982	G	Motion of respondents for leave to proceed further herein in forma pauperis filed.
14	Dec 13 1982		Motion of respondents for leave to proceed further herein in forma pauperis GRANTED.
20	Dec 8 1982	G	Motion of respondents for appointment of counsel filed.
24	Dec 28 1982		DISTRIBUTED. January 7, 1983 - Motion for appointment of counsel.
25	Dec 28 1982		DISTRIBUTED. Jan. 7, 1983. (Motion of respondents for appointment of counsel).
28	Jan 11 1983		Order extending time to file brief of petitioner on the merits until January 20, 1983.
29	Jan 17 1983		Motion for appointment of counsel GRANTED and it is ordered that Isaac N. Groner, Esquire, of Washington, D.C., is appointed to serve as counsel for the respondents in this case.
30	Jan 20 1983		Brief amicus curiae of Chamber of Commerce of U.S. filed. VIDED.
31	Jan 21 1983		Record filed.
32	Jan 21 1983		Certified original record & proceedings received.
33	Jan 25 1983	G	Motion of petitioners for divided argument filed.
35	Feb 3 1983	D	Motion of respondents in No. 81-2408 for divided argument and for additional time for oral argument filed.

No. 81-2408-CFX

Entry	Date	Note	Proceedings and Orders
36	Feb 4 1983	D	Motion of respondents in No. 81-2386 for divided argument filed.
37	Feb 16 1983		Response of petitioners to motions of respondents for divided argument filed.
38	Feb 14 1983	P	Motion of Gordon L. Higgins (THIS IS AN AMICUS BRIEF, NOT MOTION) for leave to file a brief as amicus curiae filed.
39	Feb 22 1983		Motion of petitioners for divided argument GRANTED. And divided argument on behalf of respondents is granted.
40	Feb 22 1983		Motion of respondents in No. 81-2408 for divided argument and for additional time for oral argument DENIED.
41	Feb 22 1983		Motion of respondents in No. 81-2386 for divided argument DENIED.
43	Feb 23 1983		Order extending time to file brief of respondent on the merits until March 18, 1983.
44	Jan 24 1983		Brief of petitioner United Steelworkers of Am, etc filed.
45	Mar 23 1983		Joint appendix filed.
46	Mar 24 1983		SET FOR ARGUMENT. Monday, April 25, 1983. (4th case) The case is consolidated with No. 81-2386. (1 hour)
47	Mar 24 1983		Brief of respondent filed.
48	Apr 1 1983		CIRCULATED.
49	Apr 18 1983	X	Reply brief of petitioner United Steelworkers of Am, etc filed.
50	Apr 25 1983		ARGUED.